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THE
PRACTICE
OF THE
COURT OF KING'S BENCH
IN PERSONAL ACTIONS:
WITH
REFERENCES TO CASES OF PRACTICE
IN THE
COURT OF COMMON PLEAS.
IN TWO VOLUMES.
VOL. I.

FIRST AMERICAN,
FROM THE CORRECTED AND ENLARGED LONDON EDITION.

By WILLIAM TIDD, Esq.
OF THE INNER TEMPLE.

PHILADELPHIA:

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1807.

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TO THE PUBLIC.

IN order to insure correctness the publisher of this book has subjected it to a critical examination in the following manner—Two proof-sheets have been put up for public examination; one at the publisher's counting-house, the other at the city library in Philadelphia, and a premium of one dollar has been offered for every error that might be discovered: hence it is designated a *premium* edition:

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TO

THE HONOURABLE
THOMAS ERSKINE,

CHANCELLOR

TO THE PRINCE OF WALES, &c.

THIS WORK IS DEDICATED;

WITH

THE HIGHEST RESPECT
FOR THOSE GREAT TALENTS,

AND

THAT UNIFORM INTEGRITY OF CONDUCT,
WHICH HAVE RENDERED HIM
SO DISTINGUISHED AN ORNAMENT
OF THE ENGLISH BAR.

PREFACE.

BY way of introduction to the following work, it may not be improper to take a cursory view of the proceedings in *personal* actions in the court of King's-Bench, and the practice by which they are regulated, from the commencement of the suit to the obtaining of final judgment and execution.

The principal proceedings in an action in this court are first, the *process*, to bring the defendant into court; secondly, his *appearance* and *bail*; thirdly, the *pleadings*, beginning with the declaration; fourthly, the *issue*; fifthly, the *trial*, or determination of the issue; sixthly, the *judgment*; and seventhly, the *execution*: To which may be added, the proceedings in *scire facias* to revive the judgment, or in *error* to reverse it; though these are rather to be considered as distinct actions, growing out of, than as parts of the original suit. The above proceedings are from time to time entered on the rolls of the court; which thence take
their

their denomination of the *process*-roll, the *appearance* or *recognisance*-roll, the *plea* or *issue*-roll, the *nisi-prius* roll, and the *judgment*-roll, on which latter is entered the award of *execution*.

Subordinate to these principal proceedings, there are others of an auxiliary nature, which occur in the course of a suit; such as, in bailable actions, the arrest and bail-bond, with the proceedings thereon, or against the sheriff, to compel him to return the writ or bring in the body. These happen before the plaintiff has declared absolutely. After declaration and before plea, the defendant, in order to prepare for his defence, is under circumstances allowed to crave oyer of deeds, &c. or copies of written instruments, call for the particulars of the plaintiff's demand, or claim inspection of public books, court-rolls, &c. or he may move the court to change the venue, consolidate actions, strike out superfluous counts, or bring money into court. After issue and before trial, the plaintiff should give notice of trial, sue out the jury-process, and make up and pass the record of *nisi prius*; and each party should prepare a brief for counsel, and *subpœna* his witnesses. After trial and before judgment, the unsuccessful party may move the court for a new trial, or in arrest of judgment, or for judgment *non obstante veredicto*, a repleader, or *venire facias de novo*.

The

The variations in the proceedings are occasioned, first, by the nature of the *action*, and by or against whom it is brought; as whether it be founded in contract or tort, or be brought by or against one or more plaintiffs or defendants, by the assignees of a bankrupt or insolvent debtor, or by or against baron and feme, surviving partners, executors or administrators, heirs or devisees, &c. : Secondly, by the mode of *commencing* the action; as whether it be commenced originally in the King's-Bench, or removed thither from an inferior court, and in the former case, whether it be commenced by bill of Middlesex or *latitat*, original writ, or attachment of privilege, and brought against common persons, or peers of the realm, members of the house of commons, corporations, hundredors, attornies, officers of the court, or prisoners in the actual custody of the marshal or sheriff, &c. : Thirdly, by the nature of the *process* used for bringing the defendant into court; which is either a mere summons, an attachment or *distringas* against his property, or a *capias* against his person, which latter process in point of form is common or special, and in effect is bailable or not bailable, and upon a bailable *capias*, the defendant is either taken, or stands out to process of outlawry : Fourthly, by the *appearance* of the parties; and whether they prosecute or defend the action in person or by attorney, or in case of infancy

infancy, by *prochein amy* or guardian: Fifthly, by the *course* which the proceedings take; and whether the action be prosecuted, or abate by the death of the parties, or the plaintiff voluntarily abandon it by a discontinuance, *nolle prosequi*, or *cassetur billa vel breve*, or make default, and suffer judgment of *non-pros* for not declaring, replying or entering the issue, or judgment as in case of a nonsuit for not proceeding to trial, or the defendant compromise or compound the action, confess it, or let judgment go by default.

If the action be prosecuted, the variations in the proceedings are occasioned, sixthly, by the nature of the *declaration* and subsequent *pleadings*; as whether the declaration be common or special, and consist of one or more counts, and whether it be in chief or by the bye, and delivered or filed, absolutely or *de bene esse*, and whether the defendant plead or demur thereto, and if he plead, whether it be to the jurisdiction of the court, in abatement, or in bar, and if the latter, whether he plead one or more pleas, and whether they be general or special, and if special, whether the replication thereto be in denial, or confession and avoidance, or by way of estoppel, or new-assign the injury complained of, and whether there be any rejoinder, surrejoinder, rebutter, or surrebutter, and of what it consists: Seventhly, by the nature of the *issue* joined upon the pleadings; as whether it be an issue in fact or
in

in law, and if in fact, whether it be triable by the court upon *nul tiel record*, or by a jury upon pleadings concluding to the country: Eighthly, by the mode of *trial*, and the proceedings in the course of it; as whether the trial be at bar or *nisi prius*, or by a common or special jury, or the defendant at the trial plead *puis darrein continuance*, or the parties agree to withdraw a juror, or refer the cause to arbitration, or there be a nonsuit or verdict, and if a verdict, whether it be general or special, or there be a special case, bill of exceptions, or demurrer to evidence: Ninthly, by the nature of the *judgment*; which is either for the plaintiff or defendant, for the former by *nihil dicit*, *non sum informatus*, or confession, for the latter on a *non-pros*, discontinuance, *nolle prosequi*, *cassetur billa vel breve*, *retraxit*, nonsuit, or as in a case of a nonsuit, and for either party upon demurrer, *nul tiel record*, or verdict: Lastly, by the species of *execution*; as whether it be by *fieri facias* against the defendant's goods, by *elegit* against his goods and a moiety of his lands, by *capias ad satisfaciendum* against his person, or by *extendi facias* or *extent*, against the whole of his lands, or in some cases against his body, lands and goods.

The practice of the court, by which the proceedings in an action are governed, is founded on ancient and immemorial usage, regulated from time to time by rules and orders, acts of

parliament, and judicial decisions. The practice is the law of the court, and as such is a part of the law of the land^a; and it has been so strictly adhered to, that in the case of *Bewdley*^b, a practice of seven years only was allowed to prevail against the express words of an act of parliament^c. The rules and orders of the court are either such as are made for the regulation of its general practice, or such as apply only to the proceedings in a particular cause. The general rules are confined in their operation to the court in which they are made; and for the most part respect the mode of conducting the proceedings. Hence we find, that acts of parliament are sometimes necessary, to introduce regulations extending to all the courts, or creating some change or alteration in the proceedings themselves. And as questions arise respecting the regularity of the proceedings, the court are called upon to settle, by judicial decisions, the course of their own practice, or to fix the construction of the rules or acts of parliament which have been made respecting it.

Such is the nature of practice: upon which it is observable, that as the actions and proceedings
in

^a Jenk. Cent. 295. 2 Co. ^b 1 P. Wms. 207. 223.

17. 4 Co. 93. (*b*). Hard. 98. ^c 2 Str. 755. and see 3 Bur
2 Sess. Cas. 342. 1 Wils. 162. 1755. *Sed quare?*

^d Bur. 2572.

in general are the same, in all the superior courts of common law, there must necessarily be a great uniformity in the practice of each; and especially when it is considered, that the courts have in many instances adopted the same general rules, and are governed by the same acts of parliament, in the construction of which their decisions must of course be similar. The principal differences arise from the original constitution of each particular court, its jurisdiction and officers, and the peculiar rules laid down for regulating its proceedings; and they consist for the most part in the nature of the *process* used for bringing in the defendant, &c. and the manner in which it is returnable, the *times* prescribed or allowed for particular purposes, and the *modes* of transacting business by the court or its officers.

In the following work, it is the author's intention to treat of *personal* actions, and the various means of commencing, prosecuting and defending them, in the court of King's Bench: And with that view, he has considered the proceedings, in the order in which they present themselves, and follow one another in the course of the suit; and has endeavoured to explain, not only the principal proceedings, but also such as are of a subordinate nature, with all the variations attendant upon each, by a methodical arrangement of the several acts of parliament,

parliament, rules of court, and judicial decisions respecting them. In stating the mode of commencing the suit, he has attended to the jurisdiction of the court, as it is exercised by bill, by original writ, or by attachment of privilege. The proceedings against *attornies* and officers of the court, and against *prisoners* in the actual custody of the marshal or sheriff, &c. are classed under the head of proceedings by *bill*: and the proceedings against *peers* of the realm, *corporations* and *hundredors*, under that of proceedings by *original writ*; to which *outlawry* is considered as an incident. The doctrine of *pleas* and *pleading*, and of demurrers, amendments and jeofails, is considered, with reference to the different actions, so far as appeared to be necessary for understanding the practice of the court: And the readers will here find some account of the practice on *motions*, and the cases in which the court will set aside or stay the proceedings, the subject of *arbitration*, and the law of *damages* and *costs*, with the proceedings in *scire facias* and *error*. The proceedings in *criminal* cases in general, and in *real* and *mixed* actions, being foreign to the purpose of this work, are only incidentally mentioned in the course of it: The doctrine of *attachments* however is considered, as it arises out of, and is connected with the proceedings in civil suits.

In

In preparing the present edition for the press, no pains have been spared, to render the work somewhat less unworthy of the very flattering reception it has met with from the profession. The general arrangement has been materially altered, as will appear by comparing the table of contents in this, with that of the former edition; more especially in the chapters which precede the declaration. And in the particular arrangement of some of the chapters, many transpositions have been made, in order the more clearly to connect the several parts of the subject.

A new chapter has been inserted, on the removal of causes from inferior courts, by writ of *certiorari* or *habeas corpus*, from such as are of record, or by writ of *pone, recordari facias loquelam*, or *accedas ad curiam*, from such as are not of record. The decisions of the court of King's-Bench in matters of practice, subsequent to the publication of the former edition, have been incorporated in the present; including some manuscript cases, with which the author has been favoured by his friend Mr. *Taunton*. And more than sixty rules of court have been added in this edition, to those of the former; so that now, the work will be found to contain a complete series of the rules of court, from the beginning of the reign of *James* the first to the present period. Where any errors or mistakes have been discovered, they have been carefully rectified.

Nor

Nor has the author confined himself altogether to the practice of the court of King's-Bench; but has taken a view of the means of commencing actions in the court of Common Pleas; and referred throughout to the cases of practice determined in that court, as reported by Lord Chief-Justice *Willes*, and other reporters, particularly by Messrs. *Bosanquet* and *Puller*: which in many instances will shew where the practice of the two courts corresponds, and in what respects it differs. The propriety of this extension of the original plan was suggested by Mr. Serjeant *Marshall*, to whom the author is indebted for some valuable notes and observations on the practice of the Common Pleas. The cases at *Nisi Prius*, as reported by Mr. *Peake* and Mr. *'Espinasse*, have also been occasionally referred to, where they bear upon the practice of the courts. It should be remembered however, that in the following work the author has principally had in view the jurisdiction of the court of King's-Bench in *personal* actions, its officers and rules; and has in a great measure confined his attention to the *process* of that court, and the times and manner of transacting its business. Such of the differences in the practice of the two courts, as arise out of the cases, are particularly marked in the text, or more commonly in the notes.

Since

Since the present edition went to press, and while it has been printing off, many cases have been decided in the different courts, and several acts of parliament and rules of court have been made, which have occasioned considerable alterations in the practice. These are noticed at the end of the work, by way of *Addenda*;* and are indexed with the principal matters. The *Index* also has been thoroughly revised, and adapted to the various alterations that have been made; and several of the titles, to which there were many references, have been analysed. A *Table* is subjoined, for the benefit of those who are or may be in possession of the *Appendix* of practical forms, connecting it with the present edition, and shewing in what pages of the Appendix the different forms referred to in the body of the work may be found. The author cannot conclude, without expressing his acknowledgments to his late pupil Mr. *F. Moysey*, whose assistance in preparing for and superintending the press, has contributed greatly to facilitate the present publication.

TEMPLE, Oct. 1, 1803.

* In the present edition the *Addenda* have been introduced into the body of the work.

Philadelphia, April 20, 1807.



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CHAPTER I.

Of ACTIONS, and the TIME limited for their COMMENCEMENT.

ACTIONS are commonly divided into *criminal*, or such as concern pleas of the crown, and *civil*, or such as concern common pleas^a. And these latter are again divided into *real*, *personal*, and *mixed* actions. In a *real* action, the proceedings are *in rem*, for the recovery of real property only; in a *personal* action, they are *in personam*, for the recovery of specific chattels, or of some pecuniary satisfaction or recompence; and in a *mixed* action, they are *in rem et personam*, for the recovery of real property, and damages for withholding it.

Personal actions are *ex contractu, vel ex delicto*; being founded upon *contracts*, or for *wrongs*, independently of contract^b. Actions upon *CONTRACTS* are *Account*, *Assumpsit*, *Covenant*, *Debt*, *Annuity*, and *Scire facias*.

ACCOUNT lies at common law against a *guardian* in socage, *bailiff* or *receiver*, to compel an account

^a Co. Lit. 284. b. Cowp. ^b 1 Bac. Abr. 26. Gilb. C. P. 5. 391.

count of profits, or monies received by the defendant^c; and by the statute 4 and 5 Anne, c. 16. § 27: it may be maintained against the executors and administrators of every guardian, bailiff and receiver, and also by one joint-tenant and tenant in common, his executors and administrators, against the other, as *bailiff*, for receiving more than comes to his just share or proportion, and against his executors and administrators. The proceedings in this action being difficult, dilatory and expensive, it is now seldom used; especially as the party has in general a more beneficial remedy, by action for money had and received, &c. or if the matter be of an intricate nature, by resorting to a court of equity.

ASSUMPSIT, which is now become the most common action of any upon contracts^d, lies for the recovery of *damages* upon promises, express or implied, without deed. These promises are various, according to the subject matter of them. In general, they are to pay or repay money, or to do or forbear some other act. *Express* promises are first, to pay money, on various considerations, as in consideration of forbearance (to the defendant or to third persons), indemnity, marriage, services and works, necessities, the sale, exchange, hire, or carriage of cattle or goods, the sale, assignment, or use of lands, &c. Secondly, to repay money: Thirdly,

^c Co. Lit. 172. a.

is properly an action upon the

^d The action of *assumpsit*, case. 1 Bac. Abr. 30: Gilb. though founded upon contract, C. P. 6.

Thirdly, to guarantee the payment of money, or give securities, &c. Fourthly, to indemnify: Fifthly, to marry: Sixthly, to serve or employ: Seventhly, to perform works: Eighthly, upon a sale or exchange of cattle or goods, to accept, deliver, take back or return them; or upon a warranty, as to their title, quality or value: Ninthly, upon a sale or exchange of lands, &c. by or against landlord or tenant, for not taking, letting, repairing, holding, or quitting them: Tenthly, to account for money or goods, or the profits of lands, &c.

Actions upon *implied* promises are first, the *indebitatus assumpsit*, which lies on a promise to pay a precedent debt, for monies, services and works, the sale or hire of goods, or the purchase, assignment, or use of lands, &c. Secondly, the *quantum meruit* or *valebant*, on a promise to pay the plaintiff, for the like considerations, as much as he deserved to have, or for goods, &c. as much as they were reasonably worth: Thirdly, the *insimul computassent*, on a promise to pay the sum due on an account stated between the parties: these are usually denominated *common assumpsits*: Fourthly, upon a promise to pay money, where there is no precedent debt, in consideration of a *legal liability* to pay it, as upon a promissory note, bill of exchange (inland or foreign), bye-law or foreign judgment; or for a fine on admission to copyhold premises, legacy charged on land, toll, port-duty, contribution to party-walls, &c. Fifthly, on *mutual*

tual promises, to perform a special agreement, &c. Sixthly, upon a promise in consideration of a *retainer* for reward, against an attorney, surgeon, or other person executing a professional employment: And seventhly, upon a promise founded on a *bailment*, concerning goods lent or let to hire, or against a carrier, by land or by water, wharfinger, inkeeper, farrier, &c. In some of these cases, the promise may be either express or implied.

COVENANT lies for the recovery of *damages* upon contracts by deed; as upon leases, mortgages, articles of agreement, charterparties of affreightment, indentures of apprenticeship, &c. DEBT lies for the recovery of a *sum certain*, upon simple contracts, specialties, or records; or is founded in *maleficio*, as for escapes; or upon acts of parliament, by the party grieved or common informers. ANNUITY is an action which lies for the recovery of an annuity, or yearly payment of a certain sum of money, granted to another in fee, for life or years, charging the person of the grantor only; and it may be brought by the grantee or his heirs, or his or their grantee, against the grantor or his heirs^c: This action is at present out of use, being superseded by the action of *debt* or *covenant*. SCIRE FACIAS lies by or against the parties or their representatives, to have execution on a judgment, statute or recognisance, for the sum recovered, or acknowledged to be due.

Actions

^c Co. Lit. 144. b.

Actions for WRONGS are *Case*, *Detinue*, *Replevin*, and *Trespass vi & armis*.

Actions on the *case* are founded on the common law, or given by act of parliament; and lie to recover *damages* for consequential wrongs or torts, to persons individually or relatively; or to personal property, or real property, or some right or privilege incident thereto. These actions arise from *malefeazance*, or doing what the defendant ought not to do; *nonfeazance*, or not doing what he ought to do; and *misfeazance*, or doing what he ought to do, improperly; and are commonly for doing or omitting something contrary to the general obligation of law, the particular rights or duties of the parties, or some implied contract between them. To persons *individually*, they are for some consequential hurt or damage, arising from public nuisances, or keeping mischievous animals^f; in nature of conspiracy; for malicious prosecutions, (of civil suits or criminal charges); libels, *scandalum magnatum*, or defamation of common persons; against justices or other officers, for refusing bail, &c. or against surgeons, &c. for improper treatment. To persons

^f This and some other of hereafter referred to, as affecting *personal* property, may as affecting *persons*, may and do sometimes affect *persons*, as negligence in riding property. And on the other horses, and driving carriages, hand, some of the wrongs &c.

sons *relatively*, they are for criminal conversation, seducing or harbouring wives, debauching daughters, enticing away or harbouring apprentices, and other servants; or for menacing, beating or imprisoning wives, daughters or servants, *per quod consortium vel servitium amisit*^g. To *personal* property, they are actions of *trover* and conversion; for *negligence*, in riding horses, driving carriages, navigating vessels, or performing works; against sheriffs and other officers, for escapes, false returns, or taking insufficient pledges, &c. for excessive or irregular distresses, pound-breach, and rescue of distresses for rent or damage-feasant;
rescue

^g Actions of criminal conversation, and for menacing, beating or imprisoning wives, &c. being laid *vi & armis* and *contra pacem*, are usually considered as actions of *trespass*. Mr. Justice *Blackstone* in treating of an action of this nature, calls it an action of *trespass*, in nature of an action upon the case. 3 *Blac. Com.* 140. But I have ventured to class these actions as actions on the case, for the following reasons: First, that the wrongs complained of therein are not immediate, but consequential; secondly, that the plaintiff may declare for them by bill with a *quod cum*, which is not allowed in *trespass*; 2 *Salk.* 636. 1 *Str.* 621. Thirdly, that in these actions, the plea of the statute of limitations is not guilty within six years, 2 *Bur.* 753. and not, as in trespass and assault, within four years; 2 *Salk.* 420. And lastly, that though the plaintiff should not recover forty shillings damages, he is nevertheless entitled to full costs. 1 *Salk.* 206. 2 *Ld. Raym.* 831. *S. C.* 3 *Wils.* 319.

rescue of prisoners; for unlawfully exercising trades or imitating inventions; or for *deceit*, on the sale of cattle or goods, or immoderate use of them, when lent or let to hire; and against carriers, by land or by water, wharfingers, innkeepers, farriers, &c. To real property *corporeal*, they are for nuisances of a private nature, to houses, lands, &c. to the prejudice of the plaintiff's possession or reversion; against tenants, in nature of waste; for not repairing fences, or for not carrying away tithes, &c. And to real property *incorporeal*, they are for disturbance of common of pasture, &c. ways, offices, franchises, tolls, ferries, and seats in churches.

DETINUE lies upon a bailment or finding, for the recovery of goods *in specie*, or damages for detaining them. REPLEVIN lies to recover damages for an immediate wrong, without force, in taking away and detaining cattle or goods; and answers to the action of trespass *de bonis asportatis*. TRESPASS *vi & armis* lies to recover damages for immediate wrongs, accompanied with force; to the *person*, by menaces, assault, battery, wounding, mayhem, or false imprisonment; to *personal* property, by destroying, damaging, taking away, detaining or converting cattle or goods; and to *real* property, as houses, lands, fisheries, or watercourses.

Upon *contracts*, the action should be brought by the party with whom the contract was made, if living;

or

or by his executors or administrators, if he be dead; or by his assignees, if a bankrupt, or discharged under an insolvent debtor's act: And it should be brought against the party who made the contract, or if he be dead, against his executors or administrators: But upon the contract of a bankrupt or insolvent debtor, an action at law does not lie against his assignees. Where there are *several* parties to a contract, the action should be brought by or against all of them, if living; or if some are dead, by or against the survivors: And an action may be brought by or against a surviving partner, for his own debt, as well as for that which was contracted in the life-time of the deceased^h. If an action be brought upon a joint contract, by one of several partners, the plaintiff will be nonsuited, or have a verdict against himⁱ: But if it be brought against one of several partners, he can only plead in abatement; though the plaintiff knew, and even contracted with the other partners^k.

For *wrongs*, independently of contract, the action must be brought by the party to whom the injury is done, against the party doing it. And if either of the parties die, the action is gone; for it is a rule, that *actio personalis moritur cum personâ*. But there are some exceptions to this rule, chiefly arising from an equitable construction of the statute

^h 3 T. R. 433. 5 T. R. 493. 6 T. R. 582.

ⁱ 2 Str. 820.

^k 2 Atk. 510. 5 Bur. 2611. 2 Blac. Rep. 947. 5 T. R.

649.

tute 4 Edw. III. c. 7. by which *executors* shall have an action of trespass, for a wrong done to their testator¹. Where *several* parties are jointly concerned in interest, or have suffered a joint injury^m, they may and ought to join in the same action; and if they do not, the defendant may plead in abatement, but cannot otherwise take advantage of the objectionⁿ. And as wrongs are of a joint and several nature, the plaintiff may proceed against all, or any of the parties who committed them; and it is no plea in abatement, that there are other partners not named^o. In bringing actions by or against *husband* and *wife*, the rule is, that wherever the cause of action would survive to or against the wife, they ought in general to sue or be sued jointly^p; and this rule holds as well with regard to contracts as wrongs. But sometimes, and particularly where the cause of action arises during coverture, the husband is allowed to bring the action in his own name, or in the joint names of himself and his wife.

The plaintiff in some cases has his *election* to bring one species of action or another for the same cause; as in actions upon contracts, he may bring
assumpsit

¹ 2 Bac. Abr. 444, 5. and see Cowp. 375.

ⁿ 6 T. R. 766. 7 T. R. 279.

^m 2 Saund. 115. 1 Vent. 167. 2 Lev. 97. S. C. 1 Ld.

^o 5 T. R. 649. but see 6 T. R. 369.

Raym. 127. 2 Wils. 414.

^p 1 Wils. 224. 2 Wils. 227.

assumpsit or *debt* upon a simple contract, or *debt* or *covenant* upon a specialty, for the non-payment of money: Or, if the breach of a simple contract consist in *misfeazance*, he may declare in *assumpsit*, or in *case* on the special circumstances^q; as for *deceit* on the sale of cattle or goods, or immoderate use of them, when lent or let to hire; and against attornies, carriers, wharfingers, innkeepers, &c. And where cattle or goods are wrongfully taken and detained, he may bring trespass *vi & armis*, *replevin*, *trover*, or *detinue*; or if they are converted into money, he may waive the tort, and bring *assumpsit* for money had and received^r. But the plaintiff having once made his election, cannot afterwards bring another action for the same cause, either whilst the former is depending, or after it has been determined.

It is a rule, that several counts may be *joined* in the same action for different causes, *provided they are of the same nature*. Thus, in actions upon contract, the plaintiff may join as many different counts as he has causes of action in *account*; so likewise in *assumpsit*, or in *covenant*, *debt*, *annuity*, or *scire facias*: And there is a case where it was held, that *debt* and *detinue* might be joined in the same action^s. In like manner, in actions for
wrongs

^q 2 Wils. 319. 3 Wils. 348. 1 T. R. 274.

^r Com. Dig. tit. *Action*, M.

^s Gilb. C. P. 5. 1 Bac. Abr. 30. But *trover* and *detinue* cannot be joined. Willes, 118.

wrongs independently of contract, the plaintiff may join as many different counts as he has causes of action in *case*, or in *detinue*, *replevin*, or *trespass*: And he may join *trespass* and *battery* of his servant, *per quod servitium amisit*^t, or *trespass* and *rescue*^u; though the loss of service, and consequence of the rescue, are properly the subjects of an action on the case. But with the exceptions before-mentioned, counts in actions upon contract cannot be joined with counts for wrongs independently of contract; nor can counts in any one species of these actions, be joined with counts in another^v.

In order to join several causes in one action, it must be brought, as to all of them, *in the same* right; and upon that ground it is holden, that a plaintiff cannot join in the same action, a demand as *executor*, with another which accrued in his own right.

^t Aleyn, 9. 1 Bac. Abr. C. P. 6, 7. 1 Bac. Abr. 30.
30. 1 Wils. 252. 2 Wils. 321.

^u 2 Lutw. 1249. Ld. 1 T. R. 276. 4 T. R. 347.
Raym. 83. There is also a But these rules will be found
writ in the register, *de uxore* upon examination to be de-
abductâ, cum bonis viri. F. fective. All that can be de-
N. B. 89. but this writ has duced from them is, that
been said to be against law. where the process, or the
2 Salk. 637. plea and judgment are differ-

^v Several rules are to be ent, the actions cannot be
met with in the books, by joined: but it by no means
which the *joinder of action* is follows that they may be join-
made to depend on the simi- ed, where the process, or the
larity of the *process*, the *plea* plea and judgment are the
and the *judgment*. See Gilb. same: for in actions of tres-
pass

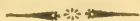
right^w. But a count for money had and received by the defendant to the use of the executor, as such, may be joined with a count for money had and received to the use of the testator^{*.} An executor or administrator may declare as such, on an account stated by the defendant, with the testator or intestate, or of monies due to himself in his representative character. And where a testator or intestate has stated an account, it is usual to declare for the balance, against his executor or administrator. Or if an executor or administrator state an account, of monies due from the *testator* or *intestate*, he may be declared against, as such, for what appears to be due^y. And in any of the above cases, other causes of action, in the same right, may be joined in the declaration. But if an account be stated by an executor or administrator, of monies due from him as such, this will not charge the estate, or subject him to an action in his representative character^z.

The *assignees* of A. a bankrupt, and also of B. a bankrupt,

pass <i>vi & armis</i> , and actions	tioned, be joined with an ac-
on the case, there is the	tion on the case.
same process of <i>attachment</i>	^w 2 Ld. Raym. 841. 2 Str.
and <i>distress</i> infinite, the same	1271. 1 Wils. 171. S. C.
plea of <i>not guilty</i> , and the	3 T. R. 659. 4 T. R. 277.
same judgment for <i>damages</i> ;	3 Bos. & Pul. 7.
and yet it is clear, that an	^x 3 T. R. 659.
action of trespass <i>vi & armis</i>	^y 1 H. Blac. 102.
cannot, except in the in-	^z <i>Id.</i> 108. 2 Bos. & Pul.
stances that have been men-	424.

^{*} From the *Addenda* to the London edition. "And a count in *assumpsit* to the plaintiff as executor, for money paid by him to the defendant's use, may be joined with another count, on a promise made to the testator." 3 East, 104.

bankrupt, under separate commissions, cannot recover, in the same action, a *joint* debt due from the defendant to both the bankrupts, and also *separate* debts due to each; and if in such an action the jury have assessed the damages severally, on the separate counts, the court will arrest the judgment on those counts which demand the debts due to each bankrupt separately ^a. But where the plaintiffs sued as assignees of A. and B. and also as assignees of C. for a joint demand, due to all the bankrupts, the declaration was holden good, on a motion in arrest of judgment ^b.



The *limitation* of personal actions is regulated by several statutes. By the 31 *Eliz.* c. 5. § 5.
 “ All actions brought for any forfeiture, upon a
 “ penal statute, whcreby the forfeiture is limited
 “ to the king only, shall be brought within *two*
 “ years after the offence committed, and not after.
 “ And all actions brought for any forfeiture, upon
 “ a penal statute, except the statute of tillage, the
 “ benefit whereof is limited to the king and the
 “ informer, shall be brought within *one* year after
 “ the offence committed; and in default thereof,
 “ the same shall be brought for the king, at any
 “ time within *two* years after that year ended:
 “ And if any action shall be brought after the time
 “ so limited, the same shall be void. Provided,
 “ that

^a 3 T. R. 433.

^b *Id.* 779.

“ that where a shorter time is limited, the action shall be brought within that time.” This statute extends to all actions brought upon penal statutes, whereby the forfeiture is limited to the king, or to the king and the party, whether made before or since the 31 Eliz. But it does not extend to actions brought by the party *grieved*^c; and where the penalty is given to a common *informer* alone, different opinions have been entertained, whether it is within the statute. On the one hand it has been said, that this is not a case within the words of the act, which ought to be taken strictly, and not extended by an equitable construction. On the other hand it has been alleged, that as the informer is bound when the king is joined with him, much more should he be bound when he sues by himself^d. And accordingly, where an action was brought after a year, by a common informer, on the statute 9 Ann. c. 14. the court of common pleas held this to be a case within the 31 Eliz. though the action be given in the first instance to the party *grieved*, and afterwards to a common informer; for such actions would have been within the 7 Hen. VIII. c. 3. and the 31 Eliz. was made to narrow the time given by that statute, and could never mean to leave any actions unrestrained in point of time; the latter
part

^c Show. Rep. 353, 4. S. C. Willes, 443. (a).
 Carth. 233. Comb. 194. 4 ^d 1 Ld. Raym. 78.
 Mod. 129. 12 Mod. 27

part of the clause must therefore be construed to extend to them^e.

By the statute 21 Jac. 1. c. 16. § 3. it is enacted,
 “ That all actions of *trespass quare clausum fregit*,
 “ &c. *detinue*, *trover*, and *replevin* for taking away
 “ goods or cattle; all actions of *account* and upon
 “ the *case*, other than such accounts as concern the
 “ trade of merchandize between merchant and
 “ merchant, their factors or servants; all actions
 “ of *debt* grounded upon any lending or contract
 “ without speciality, or for arrearages of rent;
 “ and all actions of *assault*, *menace*, *battery*,
 “ *wounding*, and *imprisonment*, shall be com-
 “ menced and sued within the times hereafter
 “ expressed, and not after; that is to say, the said
 “ actions upon the *case* (other than for *slander*,)
 “ *account*, *trespass quare clausum fregit*, &c. *debt*,
 “ *detinue*, and *replevin*, within six years next
 “ after the cause of such actions or suit, and not
 “ after; actions of *assault*, *battery*, *wounding*, or *im-*
 “ *prisonment*, within four years; and actions upon
 “ the *case* for *words*, within two years next after
 “ the words spoken, and not after.”

“ Nevertheless, if in any of the said actions,
 “ judgment be given for the plaintiff, and the same
 “ be reversed by error; or a verdict pass for the
 “ plaintiff, and upon matter alleged in arrest of
 “ judgment, the judgment be given against the
 “ plaintiff, that he take nothing by his plaint,
 “ writ

^e *Lookuſh v. Sir T. Frede- Pri. 195.*
rick, M. 6 G. III. Bul. N^o.

“ writ or bill; or if any of the said actions shall be
 “ brought by original, and the defendant therein
 “ be outlawed, and shall after reverse the outlawry;
 “ that in all such cases, the party plaintiff, his
 “ heirs, executors or administrators, as the case
 “ shall require, may commence a new action,
 “ within a year after such judgment reversed, or
 “ given against the plaintiff, or outlawry reversed,
 “ and not after.”

“ And if any person or persons, entitled to any
 “ of the said actions, shall be at the time of any
 “ such cause of action accrued, within the age of
 “ twenty-one years, feme-covert, *non compos mentis*,
 “ imprisoned, or beyond the seas; then such person
 “ or persons shall be at liberty to bring the same
 “ actions, within such times as are before limited,
 “ after their coming to or being of full age, disco-
 “ vert, of sane memory, at large, and returned
 “ from beyond the seas.”

These statutes are confined to the particular actions enumerated therein: and do not extend to actions of *annuity*, or of *account* concerning the trade of merchandize between merchant and merchant, where the accounts are open and current; nor to actions of *covenant*, or *debt* on *specialty* or other matter of a higher nature; but only to actions of *debt* upon a lending or contract without *specialty*, or for arrearages of rent reserved on parol leases[†].

A scire

[†] Hut. 109. 1 Saund. 38. 2 Saund. 66.

A *scire facias* also, being founded on matter of record, is not within the statutes of limitations.

Suits in the Admiralty Court for *seamen's* wages, not being provided for by these statutes^g, it was enacted by the 4 Ann. c. 16. § 17. that “all suits
“and actions in the court of Admiralty, for sea-
“men's wages, shall be commenced and sued within
“*six* years next after the cause of such suits or ac-
“tions shall accrue, and not after;” with the like proviso, as before, in favour of persons within the age of twenty-one years, &c. In the case of a *defendant* beyond sea^h, it was enacted, by the same statute, § 19. that “if any person or persons,
“*against* whom there shall be any such cause of
“suit or action for seamen's wages, or any of the
“causes of action mentioned in the 21 Jac. I. shall
“be, at the time of any such cause of suit or action
“accrued, beyond the seas, then the person or
“persons entitled to any such suit or action, shall
“be at liberty to bring the said actions, against
“such person and persons, after their return from
“beyond the seas, within such times as are respec-
“tively limited for the bringing of the said actions,
“by this act, and by the said other act of 21 Jac.
“I.” And by the lord's act, 32 Geo. II. c. 28.
§ 17. “no advantage shall be had or taken in any
“action or suit, against any prisoner discharged by
“virtue

^g 2 Ld. Raym. 934. 3 424. S. C.

Salk. 227. 6 Mod. 25. S. C. ^h 2 Salk. 420.

² Ld. Raym. 1204. 2 Salk.

“ virtue of that act, his heirs, executors or administrators, for that the cause of action did not accrue within six years next before the commencing thereof, unless the prisoner was entitled to take such advantage, before he stood charged in custody by virtue of the original suit or action; and in such case, the same may be pleaded by any such prisoner, his heirs, executors or administrators.”

In actions of *assumpsit*, if the plaintiff be in *England*, when the cause of action accrues, though he afterwards go abroad, the time of limitation begins to run, so that if he or his representatives do not sue within six years, the statute is a barⁱ. And if one plaintiff be abroad, and others in *England*, the action must be brought within six years after the cause of action arises^k. It has also been determined, that the statute of limitations extends to persons in *Scotland*^l. But if the plaintiff be abroad, or beyond the sea, at the time when the cause of action accrues, the statute will not run against him, till his return to this country^m. And if the plaintiff be a foreigner, and do not come to *England* for a great many years after the cause of action arises, he still has six years after his coming hither, to bring his actionⁿ: And if he never come to *England* himself, he has always a right of action while he lives abroad; and after his

ⁱ 1 Wils. 134.

^k 4 T. R. 516.

^l 1 Blac. Rep. 286.

^m 2 Str. 836. Fitzgib. 81.

S. C.

ⁿ 3 Wils. 145. 2 Blac. Rep. 723. S. C.

his death, his executors or administrators are in the same situation.

The statute cannot be a bar in any case, unless the time of limitation is expired after there hath been a complete cause of action; as if a man promise to pay ten pounds to J. S. when he comes from *Rome*, or when he marries, and ten years after J. S. marries, or comes from *Rome*, the right of action accrues from the happening of the contingency, from which time the statute will begin to run, and not from the time of the promise^o. So in *assumpsit*, where the plaintiff declared that the defendant, in consideration that the plaintiff, at the defendant's request, would receive A. and B. into his house as guests, and diet them, promised, &c. the defendant pleaded *non assumpsit infra sex annos*, upon which the plaintiff demurred, and it was held no plea; for the defendant cannot in such case plead *non assumpsit infra sex annos*, but *actio non accrevit infra sex annos*; for it is not material when the promise was made, if the cause of action be within the six years, and the dieting might be long afterwards^p.

There is no statute of limitations in an action of *debt* on bond^q: But where the bond has been given more than twenty years before the commencement of the action, and no interest has been paid upon

^o Godb. 437. 1 Lev. 48. p 2 Salk. 422. 2 I.d. Raym.
1 Blac. Rep. 354. 1 H. Blac. 838. S. C.
631. ^q Cowp. 109

upon it, nor any demand made by the obligee, nor any acknowledgment by the obligor of the existence of the debt, during that period, the law in general will presume it to be satisfied^r; particularly if the debt be large, and the obligor has been all along in good circumstances^s. And the defendant shall have the benefit of this presumption on the plea of *solvit ad diem*, unless interest appears to have been paid upon the bond, after the time mentioned in the condition; in which case he must plead *solvit post diem*^t. So where a bond has been given, or interest paid upon it, within twenty years, the law in some cases will presume it to be satisfied; as where it has been given eighteen or nineteen years, and in the mean time an account has been settled between the parties, without taking any notice of the demand^u: but in that case, the presumption must be fortified by evidence of some auxiliary circumstances^v; though after a considerable length of time, slight evidence is said to be sufficient^w.

This doctrine of presumption is said to have been first taken up by Lord *Hale*^x, who thought the lapse of time a circumstance only from whence a jury might presume payment. In this he was followed

^r 6 Mod. 22. 11 Mod. 2.
 1 Str. 652. 3 P. Wms. 395,
 &c. 1 Bur. 434. 1 Blac. Rep.
 532. 4 Bur. 1963. Cowp. 109.
 1 T. R. 270.

^s 1 T. R. 271, 2.

^t 1 Str. 652.

^u 1 Bur. 434. 1 T. R. 271.

^v Cowp. 214. 1 T. R. 270.

^w 1 T. R. 272.

^x *Id.* 271. but see 1 Chan.
 Rep. 42. 47. and the cases
 referred to in Vin. Abr. tit.
Length of time, 52, &c.

lowed by Lord *Holt*, who held that if a bond be of twenty years standing, and no demand proved thereon, or good cause of so long forbearance shewn, on *solvit ad diem*, he should intend it paid^y. This doctrine was afterwards adopted by Lord *Raymond*, in the case of *Constable v. Somerset*^z. And it is not confined to actions of *debt* on bond; but the like presumption has been made after twenty years, in an action of *debt*^a, or *scire facias*^b, on a judgment: and in a late case^c, where it appeared that the bond was not satisfied, the jury under particular circumstances, and after a great lapse of time, presumed it to have been released.

The presumption of payment however may be rebutted, by shewing that interest has been paid on the bond within twenty years, or that a demand was made by the obligee^d, or an acknowledgment by the obligor^e, with in that period, or that the defendant was in bad circumstances^f, or the demand trifling^g. In order to prove the payment of interest, or a part of the principal, an indorsement made by the obligee upon the bond, within twenty years, is allowed to be evidence^h; but an indorse-

ment

^y 6 Mod. 22. 11 Mod. 2. ^d 1 T. R. 271, 2.

^z Hill. 1 Geo. II. at *Guild-* ^e Cowp. 109.
hall. ^f *Id. ibid.*

^a 1 Str. 639.

^g *Id.* 214.

^b Peake on Evid. 16. (g)

^h 2 Str. 826. 2 Ld. Raym.

^c *Washington & Brymer*, 1370. 8 Mod. 278. Sel. Cas.
H. T. 42 G. III. K. B. Ev. 152. 3 Bro. P. C. 535. S. C.

ment made after the presumption had taken place, is not admissible¹.

In actions for *wrongs*, particular times of limitation are frequently appointed by statute, different from those in common cases. Thus by the statute 24 Geo. II. c. 44. § 8. it is provided, that “no action shall be brought against any *justice* of the peace, for any thing done in the execution of his office, or against any *constable*, *headborough*, or other officer, or person acting by his order and in his aid, unless commenced within *six* calender months after the act committed.” And by the statute 28 Geo. III. c. 37. § 23. “if any action or suit shall be brought or commenced against any person or persons, for any thing by him or them done in pursuance of this or any other act or acts of parliament now in force, or hereafter to be made, relating to his Majesty’s revenues of *customs* and *excise*, or either of them; such action or suit shall be commenced within *three* months next after the matter or thing done, &c.”^k. On which latter statute it has been holden, that the action must be commenced within three months from the time of the original seizure, notwithstanding the pendency of process in the Exchequer^l.

To

¹ 2 Str. 837. 2 Vez. 43. 24 G. III. sess. 2. c. 47. § 35. acc. 1 Barnard. K. B. 432. 39. contra.

¹ 2 H. Blac. 14. 2 East.

^k See also the former statutes of 23 G. III. c. 70. § 34. 454.

To take a case out of the statute of limitations, it is usual in *assumpsit* to prove a promise to pay, or acknowledgment of the debt, within six years before the commencement of the action. And a *conditional* promise has been held sufficient for this purpose, as well as an *absolute* one; as where the defendant said to the plaintiff, *prove your debt, and I will pay it*^m. But if an executor bring *assumpsit* on a promise made to his testator, and the defendant plead that he made no promise to the testator within six years; if issue be joined thereon, a promise to the executor within six years, will not maintain the actionⁿ.

It was formerly doubted, whether a bare *acknowledgment* of the debt, without a *promise* of payment, was sufficient to take the case out of the statute; such an acknowledgment being only considered as *evidence* of a promise: as in *trover*, where a demand and refusal is not held to be a conversion, but only evidence of it. A bare acknowledgment however^v, and that of the slightest nature^p, is now deemed sufficient to prevent the operation of the statute. And an acknowledgment by one of several drawers of a joint and several promissory note, will take the case out of the statute, as against any one of the other drawers, in a separate action on the

^m 1 Ld. Raym. 389. 422. 1101. 6 Mod. 309. S. C. Bul.
1 Salk. 29. Carth. 470. 5 N. Pri. 150. 3 East, 409.
Mod. 425. S. C. and see 2 ° 2 Bur. 1099.
Show. 126. 2 Vent. 151. 12 P 5 Bur. 2630. and see
Mod. 224. Cowp. 548. 4 Esp. Cas. N.

ⁿ 1 Salk. 28. 2 Ld. Raym. Pri. 46.

the note against him^a. So where one of two drawers of a joint and several promissory note having become a bankrupt, the payee receives a dividend under the commission on account of the note, this will prevent the other drawer from availing himself of the statute, in an action brought against him for the remainder of the money due on the note; the dividend having been received within six years before the action brought^r. If a letter be written by a defendant to the plaintiff's attorney, on being served with a writ, couched in ambiguous terms, neither expressly admitting or denying the debt, it should be left to the jury, to consider whether it amounts to an acknowledgment of the debt^s. And if there be a mutual account of any sort between the plaintiff and defendant, for any *item* of which credit has been given within six years, that is evidence of an acknowledgment of there being such an open account between the parties, and of a promise to pay the balance, as to take the case out of the statute^t. *

In order to shew that the action was commenced in due time, a bill of *Middlesex* or *latitat* is as effectual as an *original* writ^u. And an *attachment* of

^a Doug. 652, 3. *N. B.* In referring to *Douglas's Reports*, I have attended to the paging of the second *folio* edition, which is preserved in the last, or *octavo* edition.

^r 2 H. Blac. 340.

^s 2 T. R. 760.

^t 6 T. R. 189.

^u Sty. Rep. 156. 178. 1 Sid. 53. 60. Carth. 233. 2 Ld. Raym. 880. 1 Str. 550. 2 Str. 736. 2 Ld. Raym. 1441.

S. C.

* *From the Addenda to the London edition.* "But where the defendant, on being applied to for payment, said, 'I think I am bound in honour to pay the money, and shall do it when I am able,' Lord Kenyon ruled, that it was a conditional promise only, and that the plaintiff was bound to shew that the defendant was then of sufficient ability to pay; adding, that it had been so ruled before by lord chief-justice Eyre." 4 Esp. Cas. *Ni. Pri.* 36. and see 2 H. Blac. 116

of privilege is holden to be a good commencement of the suit ^v, even though it be informal ^w. But an *attachment* of privilege is not a continuance of a bill of *Middlesex*, so as to avoid the statute ^x. As against an *attorney* or officer of the court, or a *prisoner* in the actual custody of the marshal, the statute can only be avoided, by filing a *bill* with the clerk of the declarations, in the King's Bench office; which bill may be filed in vacation, as well as in term time ^y. In proceeding against a *peer* of the realm, *corporation*, or *hundredors* on the statutes of hue and cry, &c. an *original* writ must be sued out, for avoiding the statute: And where a *member* of the house of commons is defendant, the plaintiff must proceed for that purpose, either by suing out an *original* writ, and getting it returned *nihil*^z, or by *bill* and summons, &c. on the statute 12 & 13 W. III. c. 3. § 2. If a plaint be levied in an *inferior* court, in due time, and then it is removed into the King's Bench by *habeas corpus*, and the plaintiff declares here *de novo*, and the defendant pleads the statute of limitations, the plaintiff may reply, and shew the

S. C. Willes, 258. 2 Bur. 961. x 3 T. R. 662. but see
1 Blac. Rep. 215. S. C. 3 Willes, 259 (c).

Bur. 1241. 1 Blac. Rep. 312. y Doug. 313, 14. 5 T. R.

S. C. 2 Blac. Rep. 925. 173. 325. but see Peake's

v 1 Show. 366. 2 Salk. 420. Cas. *Ni. Pri.* 209.

S. C. z 1 Lev. 111. 2 Ld. Raym.

w 2 Blac. Rep. 1131. 1113.

the plaintiff in the inferior court, and that will be sufficient to avoid the statute ^a.

If an executor take out proper process in *assumpsit*, within a year after the death of his testator, the six years not being elapsed before, though they expire within that period, yet it will be sufficient to take the case out of the statute ^b. So if an executor bring *assumpsit*, but die before judgment, and the six years run, his executor may notwithstanding bring a fresh action ^c, provided he does it *recently*, or within a reasonable time. What shall be deemed a reasonable time in this case is a matter of considerable doubt, and there are various opinions in the books upon the subject. In *Spencer's case* ^d, it is said to be entirely in the discretion of the court. In another case it is said, that heretofore they used to allow half a year, but that was held to be too long, and therefore they allowed but thirty days ^e. In a third case, a year was said to be a reasonable time ^f: And this opinion was adhered to in a subsequent case ^g, in analogy to that part of the statute, which authorizes the party to bring a new action,

^a 1 Sid. 228. 1 Lev. 143.

S. C. 1 Ld. Raym. 553. 2 Salk. 424. 2 Ld. Raym. 881. 2 Str.

719. 2 Ld. Raym. 1427. S. C.

^b Bul. *Ni. Pri.* 150.

^c 2 Salk. 425. Bul. *Ni. Pri.* 150.

^d 6 Co. 10.

^e 1 Ld. Raym. 283. 1 Salk

393. S. C. and see 1 Lutw 297.

^f 1 Ld. Raym. 434. 1 Lutw 256. S. C. and see 6 Edw. III 32. b. Willes, 257 (*a*).

^g 2 Str. 907. Fitzgib. 170. 289. 1 Barnard, K. B. 335. S. C.

action, within a year after the reversal of the judgment by writ of error^h, &c. But whatever may be the precise rule upon this subject, it seems that if a new action be brought within half a year, after the abatement of the former, it would be sufficient to avoid the statuteⁱ.

^h Cro. Car. 294.

ⁱ Cowp. 738, 40.

CHAPTER II.

Of the JURISDICTION of the COURT of KING'S BENCH in PERSONAL ACTIONS; of the OFFICERS of the COURT; and of the QUALIFICATION and DUTIES of ATTORNIES.

THE Court of King's Bench has an original jurisdiction in actions for trespasses *vi et armis*, committed in *Middlesex*, or other county where the court sits^a: and it has by degrees acquired a jurisdiction, which it exercises by *original writ*, in all personal actions, brought against any person not privileged as an attorney or officer, nor being a prisoner in the actual custody of the marshal. This court has also jurisdiction in all personal actions, brought by or against its *attornies* and *officers*^b; who are entitled to sue therein by *attachment* of privilege, and must be sued by *bill*: And *members* of the house of commons may be sued therein by *bill*, and summons, &c. in consequence of the statute 12 & 13 W. III. c. 3. § 2. This court has likewise jurisdiction by *bill*, in all personal actions brought against *prisoners* in the actual custody of the marshal, or persons who have put in bail upon a *cepi corpus* or *habeas corpus*, and who are still for this purpose supposed to be in custody^c. On these grounds,

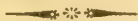
^a Trye's *jus filizarii*, 28.

Blac. 270. 299.

^b 4 Inst. 71, 2. 1 H.

^c Trye, 28.

grounds, the court by a fiction is enabled to hold plea by *bill*, in all personal actions whatever; for on feigning a complaint of trespass, over which the court has an inherent jurisdiction, the plaintiff is allowed, when the defendant is brought in on such complaint, to waive or abandon it, and to exhibit his bill and declare against him as a prisoner, for any other species of injury^d.



The *officers* of this court are first, and principally, the *judges*, consisting of the Lord Chief Justice, created by writ, and three other justices, created by letters patent; who, by the statute 12 & 13 W. III. c. 2. hold their places *quamdiu bene se gesserint*, and not, as formerly, *durante bene placito*: And by the statute 1 Geo. III. c. 23. enacted at the earnest recommendation of the king himself from the throne, the judges are continued in their offices during their good behaviour, notwithstanding any demise of the crown, (which was formerly held^e immediately to vacate their seats,) his majesty having been pleased to declare, that he looked upon the independence and uprightness of the

^d R. E. 15 G. II. Cowp. tions by *bill*, see Sul. Lect. 455. And for an account of 32. p. 300, &c. 3 Blac. Com. the jurisdiction in general of 42. 2 H. Blac. 271. 299. the court of King's Bench, 300. and of that in particular ^e 2 Ld. Raym. 747. which it exercises in civil ac-

the judges, as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown^f. Secondly, the *clerk of the crown*^g, or king's *coroner* and attorney, usually called the *master* of the crown office, who holds his place for life, by letters patent under the great seal; and has the appointment of the secondary, clerk of the rules, examiner, calendar-keeper, clerk of the grand-juries, and clerks in court. Thirdly, the *prothonotary*, or *chief-clerk* for enrolling pleas, in civil causes depending between party and party, on the plea side of the court; and particularly by *bill*^h. This officer is appointed for life, by the chief justice of the court for the time being; and has the appointment of the *secondary*, or deputy to the chief clerk, usually called the *master* of the King's Bench office, and his *assistant*, the clerk of the *rules*, the clerk of the *papers*, the clerk of the *declarations*, the clerk of the *common bails*, *postea* and *estreats*, the clerk of the *dockets*, *commitments* and *satisfactions*, and the *signer* of the writs; all of whom, except the master and his assistant, and the signer of the writs, hold their places for life, by writing under the hand and seal of the chief clerk; and most of them have deputies, to assist in the execution of their offices.

Other

^f Com. Journ. 3 Mar. 1761.

^h 1 Ch. Cas. 20. Show. P. C. 111. Skin. 354.

^g Show. P. C. 111. and see Cas. temp. Talb. 97.

ⁱ 1 Vent. 296. 2 Mod 95. S. C.

Other officers appointed by the chief justice are the *filacers*^k, *exigenter*, and clerk of the *outlawries*^l, for proceedings by *original writ*; and the clerk of the *treasury*^m, and keeper of the *writs* and *records* of the court, commonly called the *custos brevium*ⁿ. The office of *custos brevium*, as well as that of *prothonotary*, has usually been granted for the lives of two persons, and the survivor of them: and the *custos brevium* has annexed to his office, the making up of records of *nisi prius*, except in *Middlesex*; and appoints the clerk of the *inner* and *upper* treasury, the clerk of the *outer* treasury, the bag-bearer, and the clerks of *nisi prius*, for making up the above records. The chief justice also appoints the clerk of the *errors*, and clerk of *nisi prius* for *Middlesex*, whose business it is to transcribe from the plea-rolls, the records of *nisi prius* in that county, and to examine and seal the same, and to receive and file the *warrants* of attorney on the plea side of the court. The three other judges have the appointment of the *signer* of the bills of *Middlesex*; and each of the judges appoints his own clerk.

Besides the officers that have been mentioned, there are others who derive their authority more immediately

^k These officers are appointed to sign *original writs*, and all writs and process issuing thereon, before the appearance of the defendant. R. H. 30 Car. II. R. H. 31 Car. II. and R. E. 31 Car.

and Trye's *jus fil. per tot.*

^l Trye, *in pref.*

^m This officer is required to appoint a person to attend in the treasury, that the clerks may have access to the rolls R. T. 1656. reg. 2.

ⁿ See also R. M. 15 Car. I. 1 Lev. 1. 1 Sid. 71.

immediately from the crown, namely, the *marshal*^o, the *sealer* of the writs, and the chief *usher* and *crier* of the court. The office of *marshal* was granted by King James the First, in the 14th year of his reign, to *Sir William Smith* knight, in fee; and the appointment to that office, as well as of the inferior officers, continued in the proprietors of the inheritance of the prison, till the statute 27 Geo. II. c. 17. by which the office was revested in the crown; and by that statute, the marshal has the appointment of all inferior officers belonging to his office, such as the *deputy marshal*, *chaplain*, clerk of the *papers* of the King's Bench prison, and clerk of the *day rules*; (which latter officers, as well as the marshal, must be resident within the prison, or its rules^b;) three *turnkeys*, and four *tipstiffs*, (one for each of the judges,) &c.

The office of *sealer* of the writs was granted by King Charles the Second, in the 25th year of his reign, to the Duke of *Cleveland*, and his heirs male, in default of issue male of Lord *George Fitzroy*; and is now vested in the Duke of *Grafton*, who exercises the same by deputy. The seal office is open from eleven o'clock in the forenoon till one o'clock^a, in term time as well as vacation, and from four till seven o'clock in the afternoon, in term time; in vacation, it closes an hour sooner in the afternoon:
And

^a 2 Salk. 439. 3 Salk. 320. 511.

S. C.

^a R. M. 34 G. III

^b 4 T. R. 716. 5 T. R.

And the feast of *Saint Barnabas*^r, or the twenty-ninth of *May*^s, are not holidays at this office; but the only allowed holidays are *Candlemas*, the *Ascension*, and *St. John the Baptist*^t. The chief *usher* and *crier* of the court holds his place for two lives, by letters patent under the great seal; and executes the same by two deputy ushers, and two deputy criers, who, according to a late determination^u, are considered as distinct and independent officers.

Sheriffs may also to some purposes be considered as officers of the court; and it is their duty to have deputies therein, to receive and return writs and process^v: which deputies are required to give their personal attendance in Westminster-hall, daily in term time^w. And for the prevention and remedy of delays and abuses in sheriffs, under-sheriffs, bailiffs of liberties, and their deputies, and other bailiffs of sheriffs, &c. in the execution of process and writs, it is a rule^x, that

^r 2 Blac. Rep. 1186. 1314.

^s 7 T. R. 336.

^t *Id. ibid.* It was formerly usual to seal *blank* writs; but an inconvenience having attended this practice, it was ordered that for the future, no printed blanks, or other writs, should be sealed, before the same were regularly made out, and filled up. R. 3d Apr. 1747. And by several old rules of court, no signable writs are to be sealed, till they have been duly sign-

ed by the proper officer. R.

T. 1656. R. E. 1659. R. E.

15 Car. II. reg. 1. and see R.

M. 13 Car. II. R. H. 25 Car.

II. R. E. 32 Car. II. and

R. T. 4 W. & M. reg. 3.

^u Peak's Cas. *Ni. Pri.* 182.

^v Stat. 23 Hen. VI. c. 9.

R. M. 1654. § 1. R. E. 15

Car. II. reg. 4.

^w R. H. 21 Car. I. R. E.

15 Car. II. reg. 4. and see R.

E. 23 Car. I. and R. M.

1654. § 1.

^x R. M. 1654. § 2.

if any such officer shall wilfully delay the execution or return of any process or execution, or shall take or require any undue fees for the same, or shall give notice to the defendant, thereby to frustrate the execution of any process or writ; or having levied money, shall detain it in his hands, after the return of the writ; besides the ordinary course of amerciaments, the contempt or misdemeanor appearing, an attachment, information, commitment or fine shall be, as the case requireth; and this as well in case of a late, as the present sheriff, &c.

There are other officers, who may here be noticed, though they are not properly officers of the court. These are the officers who attend on the trial of causes at *nisi prius*, in *London* and *Middlesex*, consisting of the clerk of *nisi prius*, associate and marshal, crier, and train-bearer, who are appointed by the chief justice; and the officers belonging to the different *circuits*, namely, the clerk of assize, associate, clerk of arraigns, clerk of indictments, judge's marshal, crier, clerk, steward and tipstaff^y.



An *attorney* is a person put in the place, stead, or turn of another, to manage his law concerns^z; and before

^y For a more particular account of the officers of the court, their appointment, duties, and fees, &c. see the report of the select committee of the house of commons, respecting courts of justice. 26 June 1798.

^z 3 Blac. Com. 257.

before the statute Westm. II. (13 Edw. I.) c. 10. the parties to a suit could not have appeared by attorney, without the king's special warrant, by writ or letters patent; but must have attended the court in person^a. By the above and other ancient statutes, a general liberty was given to the parties, of appearing and prosecuting or defending their suits by attorney; in consequence whereof the increase of attornies was so great, that several acts of parliament were made to regulate them, and to limit their number^b. And by the statute 3 Jac. I. c. 7. it was enacted, that "none should from thenceforth be admitted attornies, in any of the king's courts of record at *Westminster*, but such as had been *brought up* in the same courts, or otherwise well practised in soliciting causes; and had been found by their dealings, to be skilful and of honest dispositions." In confirmation of this statute, a rule of court was made, that none should be admitted an attorney of this court, unless he should have served, by the space of five years, as a clerk to some judge, serjeant at law, practising counsel, attorney, clerk, or officer of one of the courts at *Westminster*; and were also, on examination, found of good ability and honesty for such

^a Co. Lit. 128. a. 2 Inst. Hen. VI. c. 7. See also the 249. 378. F. N. B. 25. C. Rules of E. 9 Eliz. M. 15 Gilb. C. P. 32. Eliz. and T. 24 Eliz. C. P.

^b 4 Hen. IV. c. 18. 33

such employments^c. And it was then usual, to nominate twelve or more able practisers of the court yearly, whose business it was to examine such persons as should desire to be admitted attorneys: which persons were first to attend the prothonotary, with their proof of service, and then to repair to the persons appointed to examine them, and on being approved, were to be presented to them and sworn in, unless some just exception were made against them^d.

At length, by the statute 2 Geo. II. c. 23.^e, continued by the 12 Geo. II. c. 13. § 3. and 22 Geo. II. c. 46. § 2. and made *perpetual* by the 30 Geo. II. c. 19. § 75. it was enacted, that “no
“ person shall be permitted to act as an attorney,
“ or to sue out any writ or process, or to com-
“ mence, carry on, or defend any action or ac-
“ tions, or any proceedings, either before or after
“ judgment obtained, in the name or names of
“ any other person or persons, in his majesty’s
“ court of King’s Bench, &c. unless such person
“ shall have been bound, by *contract in writing*^f,
“ to serve as a clerk, for and during the space of
“ five years, to an attorney duly and legally sworn
“ and admitted according to that act; and that
“ such person, for and during the said term of
“ five years, shall have *continued* in such service;
“ and

^c R. M. 1654. § 1.

^e § 5.

^d Same Rule, § 4. See also
R. M. 3 Ann.

^f Append. Chap. II. § 4.

“ and also unless such person, after the expiration
 “ of the said term of five years, shall be *examined*,
 “ *sworn*, *admitted*, and *enrolled*, in manner therein
 “ mentioned: And that in case any person shall
 “ in his own name, or in the name of any other
 “ person, sue out any writ or process, &c. as an
 “ attorney or solicitor, for or in expectation of
 “ any gain, fee, or reward, without being ad-
 “ mitted and enrolled as aforesaid, every such
 “ person, for every such offence, shall forfeit and
 “ pay 50*l.* to the use of the person who shall pro-
 “ secute him for the said offence; and is thereby
 “ made incapable to maintain or prosecute any
 “ action or suit, in any court of law or equity, for
 “ any fee, reward, or disbursements, on account
 “ of prosecuting, carrying on, or defending any
 “ such action, suit, or proceeding^g.” By subse-
 quent statutes, it is made penal for any person
 to act as an attorney in the *county court*^h, or at
 any general or quarter *sessions* of the peaceⁱ, unless
 such person shall have been duly admitted an at-
 torney, and enrolled as aforesaid.

And for the better preventing unqualified per-
 sons from being admitted attornies and solicitors,
 and for rendering the said act of 2 Geo. II. more
 effectual, “ every person who shall be bound by
 “ contract in writing to serve as a clerk to any at-
 “ torney or solicitor, as by the said act is directed,
 “ shall

^g 2 Geo. II. c. 23. § 24.

ⁱ 22 Geo. II. c. 46. § 12.

^h 12 Geo. II. c. 13. § 7.

“ shall within three months next after the date of
“ every such contract, cause an *affidavit* to be
“ made and duly sworn, of the actual execution
“ of every such contract, by every such attorney
“ or solicitor, and the person so to be bound to
“ serve as a clerk as aforesaid; and in every such *affi-*
“ *davit* shall be specified the names of every such
“ attorney and solicitor, and of every such person
“ so bound, and their places of abode respectively,
“ together with the day of the date of such con-
“ tract^k; and every such affidavit shall be *filed*,
“ within the time aforesaid, in the court where
“ the attorney or solicitor to whom every such
“ person respectively shall be bound, hath been
“ enrolled as an attorney or solicitor, with the
“ respective officers or their deputies therein men-
“ tioned, who shall make and sign a *memorandum*
“ or mark of the day of filing every such affidavit,
“ at the back or bottom thereof^l; and no per-
“ son who shall become bound as aforesaid shall
“ be admitted or enrolled an attorney or solicitor,
“ in any court in the said act mentioned, before
“ such affidavit, so marked by the proper officer,
“ shall be produced, and openly read in the
“ court where such person shall be admitted and
“ enrolled an attorney or solicitor^m.” The officer
appointed for this purpose, in the court of King’s
Bench, is the chief clerk of that court, or his de-
puty:

^k Append. Chap. II. § 2. ^m *Id.* § 4.

^l 22 Geo. II. c. 46. § 3.

putyⁿ; who is directed to keep a book, wherein shall be entered the substance of such affidavit, specifying the names and places of abode of every such attorney or solicitor, and clerk or person bound as aforesaid, and of the person making such affidavit, with the date of the articles or contract, and the days of swearing and filing every such affidavit respectively, for which a fee of two shillings and sixpence is allowed to be taken, and no more^o. And *indemnity* acts are occasionally passed, relieving persons who have neglected to file their affidavits within the limited time.

By the *revenue* laws, the contract of service is subject to the stamp duty of *seven* shillings; and to the duty of *sixpence* for every twenty shillings of every sum of 50*l.* or under, and to the duty of *one shilling* for every twenty shillings of every sum amounting to more than 50*l.* which shall be given, paid, contracted, or agreed for, with or in relation to every clerk, and proportionably for greater or lesser sums; to be paid by the master, within two months after the execution of the contract^p. And by a late act of parliament^q, an additional stamp duty of 100*l.* is imposed upon every contract in writing, whereby any person shall become bound to serve as a clerk, in order to his admission as a solicitor or attorney, in any of his majesty's courts at *Westminster*, over and above all other duties payable

ⁿ 22 Geo. II. c. 46. § 5.

^p 8 Ann. c. 9. § 32. 37.

^o *Id.* § 6.

^q 34 Geo. III. c. 14. § 1.

able by law upon or in respect of the same: And it is thereby enacted, that “no person, who by any
 “such contract shall be bound to serve as a clerk
 “as aforesaid, shall be admitted to be a solicitor
 “or attorney in any of the said courts, unless the
 “*indenture* or other writing containing such con-
 “tract, duly stamped according to the directions
 “of the said act, shall be enrolled or registered
 “with the proper officer to be appointed for that
 “purpose, in the court wherein such person shall
 “propose to be afterwards admitted a solicitor or
 “attorney, by virtue of his service under such
 “contract; together with an *affidavit* of the time
 “of the execution of the contract by such clerk;
 “and in case such *indenture* or other writing shall
 “not be enrolled or registered in such court, with-
 “in six months next after the execution thereof,
 “together with such *affidavit* of the time of the
 “execution of the contract, then the service of
 “such clerk under such *indenture* or writing shall
 “be deemed to commence from the time of such
 “enrolment or registry only, and not from the
 “execution of such *indenture* or writing^r.” This
 act of parliament, considered as a matter of regula-
 tion, will probably in time be productive of the
 most beneficial consequences.

No attorney or solicitor is allowed to have more
 than *two* clerks, at one and the same time^s; nor
 can

^r 34 Geo. III. c. 14. § 2. ^s 2 Geo. II. c. 23. § 15.

can take, have, or retain any clerk, who shall become bound by contract in writing as aforesaid, after such attorney or solicitor shall have discontinued or left off, or during such time as he shall not actually practise as, or carry on the business of an attorney or solicitor^t. And by a late rule of court, “no attorney who shall be retained or employed as a writer or clerk, by any other attorney, shall during the time of such employ, take or have any clerk under articles; and no service to any such attorney under articles, during the time that such attorney shall be so employed by any other attorney, shall be deemed “good service^u:” which rule was determined by the court, to have a retrospective operation; it not being introductive of any new regulation, but confirmatory of an old one^v. And where articles of clerkship appeared to have been entered into collusively, between an attorney and a person who was and continued to act as a turnkey of the King’s Bench prison, for the purpose of securing the business of the prisoners to the attorney, the court ordered them to be cancelled^w.

With respect to the *service* in general, under articles of clerkship, it is enacted, that “every person who shall become bound by contract in writing to serve any attorney or solicitor, shall
“ during

^t 22 Geo. II. c. 46. § 7. ^v 4 T. R. 492.

^u R. T. 31 G. III. 4 T. ^w 1 Bur. 291.

“ during the whole time and term of service to be
 “ specified in such contract, continue and be ac-
 “ tually employed by such attorney or solicitor, or
 “ his or their agent or agents, in the proper busi-
 “ ness, practice, or employment of an attorney
 “ or solicitor^x.” And it has been holden, that
 this requisite is not complied with, by the clerk’s
 serving part of the time with another attorney,
 though with his master’s consent, and the rest of
 the time with his master^y. Also, by the above
 rule of court, “ no person who shall enter
 “ into articles with an attorney or attornies,
 “ shall be at liberty to serve the *agent* or agents
 “ of such attorney or attornies, under such arti-
 “ cles, for a longer time than one year of his
 “ clerkship; and any such service to an agent
 “ or agents beyond that time, shall not be
 “ deemed good service^z.”

“ Provided always, that if any such attorney or
 “ solicitor, to or with whom any such person shall
 “ be so bound, shall happen to *die*, before the ex-
 “ piration of such term, or shall *discontinue* or leave
 “ off such his practice as aforesaid, or if such con-
 “ tract shall by mutual consent of the parties be
 “ *cancelled*, or in case such clerk shall be legally
 “ *discharged* by any rule or order of the court,
 “ wherein such attorney or solicitor shall practise,
 “ before the expiration of such term, and such
 “ clerk

^x 22 Geo. II. c. 46. § 8.

^z R. T. 31 G. III. 4 T. R.

^y 7 T. R. 456.

379.

“ clerk shall in any of the said cases be bound by
“ another contract or other contracts in writing to
“ serve, and shall accordingly serve in manner
“ before-mentioned, as clerk to any other practising
“ attorney or attornies, solicitor or solicitors re-
“ spectively, during the residue of the said term
“ of five years, then such service shall be deemed
“ and taken to be as good, effectual, and avail-
“ able, as if such clerk had continued to serve as
“ a clerk for the said term, to the same person to
“ whom he was originally bound; so as an affidavit
“ be duly made and filed of the execution of such
“ second or other contract or contracts, within
“ the time, and in like manner, as is before di-
“ rected, concerning such original contract^a.”

And such second contracts are not subject to, or chargeable with any of the duties imposed by the said act of 34 Geo. III. c. 14. § 8.

And to the intent that better information may be obtained, touching the fitness and qualifications of persons applying to be admitted attornies, it is ordered, by some late rules of court, that
“ every person who shall intend to apply for ad-
“ mission as an attorney in this court, and who
“ shall not have been admitted an attorney or soli-
“ citor of any other court, shall for the space of
“ one full term, previous to the term in which he
“ shall apply to be admitted, cause his name and
“ place of abode, and also the name or names,
“ and

^a 22 G. II. c. 46. § 9.

“ and place or places of abode of the attorney or
 “ attornies to whom he shall have been articulated,
 “ written in legible characters, to be affixed on
 “ the outside of the court of King’s Bench, in
 “ such place as public notices are usually affixed
 “ on^b; and also enter, or cause to be entered, in
 “ a book to be kept for that purpose, at each of
 “ the judges’ chambers of this court, his name and
 “ place of abode, and also the name and place of
 “ abode of the attorney or attornies to whom he
 “ shall have been articulated^c. ”

And before he can be admitted an attorney or solicitor, every person who shall become bound as a clerk as aforesaid, is required to cause an *affidavit* of himself, or the attorney or solicitor to whom he was bound, to be duly made and filed with the proper officer appointed for that purpose, (being in this court the chief-clerk or his deputy,) that he hath actually and really served, and been employed by such practising attorney or attornies, solicitor or solicitors, to whom he was bound as aforesaid, or his or their agent or agents, during the said whole term of five years, according to the true intent and meaning of the statute 22 Geo. II. c. 46. § 10^d. An *affidavit* is also required to be made by the person to be admitted, of the payment of the duty imposed by the statute 34 Geo. III. c. 14.; in which

^b R. T. 31 G. III. 4 T. R.
 379. Append. Chap. II. § 3.

^c R. T. 33 G. III. 5 T. R. 368.
^d Append. Chap. II. § 4.

which he shall insert the sum paid in respect thereof, and shall specify the name and place of abode of the person or persons with whom such contract of service was entered into, the time of the execution thereof, and the time of enrolling or registering the same: and in case such person shall have been previously admitted a solicitor or attorney in some other court, shall also specify in such affidavit, the court in which he has been so admitted, and the time of his admission therein^e; and shall cause the same to be duly filed in the court in which he proposes to be so admitted a solicitor or attorney, with the proper officer appointed for receiving and filing such affidavits; and every such affidavit shall be produced, and openly read in the court in which such person shall be admitted a solicitor or attorney, before he shall be enrolled or registered therein^f.

The *oath* (or *affirmation*, if by a *quaker*) required to be taken by an attorney before admittance, is that he will truly and honestly demean himself, in the practice of an attorney, according to the best of his knowledge and ability^g; besides which, he is to take the oaths of allegiance and supremacy, and to subscribe the declaration against popery^h; or if a Roman catholic, the declaration and oath prescribed by the statute 31 Geo. III. c. 32ⁱ. But
the

^e Append. Chap. II. § 5. Chap. II. § 6.

^f 34 Geo. III. c. 14. § 3. ^h 7 & 8 W. III. c. 24. 13

^g 2 Geo. II. c. 23. § 13. 12 W. III. c. 6. § 3 .

Geo. II. c. 13. § 8. Append. ⁱ See Butl. on Co. Lit. 391 (a).

the judges of the court, or one or more of them, before they admit any person to take the said oath or affirmation, are to *examine* and inquire, by such ways and means as they shall think proper, touching his fitness and capacity to act as an attorney; and if such judge or judges respectively shall be thereby satisfied, that such person is duly qualified to be admitted to act as an attorney, then and not otherwise, the said judge or judges are to administer in open court to such person, the said oath or affirmation; and after such oath or affirmation, to cause him to be *admitted* an attorney, and his name to be *enrolled* as an attorney in such court, without any fee or reward, other than one shilling for administering the oath or affirmation; which admission shall be written on parchment, in the *English* tongue, in a common legible hand, and signed by such judge or judges respectively, whereon the lawful stamps shall be first impressed, and shall be delivered to the person so admitted^k. These stamps at present amount to 8*l*. And in this court, the chief-clerk or his deputy is required, without fee or reward, to *enrol* the name of every person who shall be admitted an attorney therein, and the time when admitted, in an alphabetical order, in a roll or book to be provided and kept for that purpose, in the King's Bench office; to which roll or book all persons may have free access, without fee or reward^l. And of so high an authority is this roll, that

^k 2 Geo. II. c. 23. § 6.

^l *Id.* § 13.

that if an exemplification of it be annexed to a plea of privilege, the plaintiff must reply *nul tiel record*, and cannot otherwise try the fact of the defendant's being an attorney^m.

The habitations however, of many attornies, practising in this court, resident in and near the cities of *London* and *Westminster*, being often very difficult to be found; whereby it was impracticable duly to serve them with notices, summonses, orders, and rules, to the great delay of the proceedings in this court; a rule was made in *Hilary* term, 8 Geo. III. that the master should forthwith cause to be prepared a proper alphabetical book, for the purposes after-mentioned; and that the same should be publicly kept at the master's office in the King's Bench Walks, to be there inspected by any attorney or his clerk, without fee or reward; and that every attorney practising in this court, and residing in *London* and *Westminster*, or within ten miles of the same, should, before the first day of the then next term, enter in such book, in alphabetical order, his name and place of abode, or some other proper place within the cities of *London* and *Westminster*, where he might be served with such notices, summonses, orders and rules: And it is thereby required, "that every attorney afterwards
"to be admitted, and practising and residing as
"aforesaid, shall upon his admission make the like
"entry

^m 1 Ld. Raym. 336. 7 Mod. 305. 2 Ld. Raym. 1172.
Mod. 106. 2 Salk. 545. 6 1 Str. 76. 532.

“ entry; and that as often as any such attorney
 “ shall change his place of abode, or the place
 “ where he may be so served with notices, sum-
 “ monses, orders and rules, he shall make the
 “ like entry thereof in the said book; and that all
 “ notices, summonses, orders and rules, which
 “ do not require a personal service, shall be deemed
 “ sufficiently served on such attorney, if a copy there-
 “ of shall be left at the place lastly entered in such
 “ book, with any person resident at or belonging to
 “ such place; and if any such attorney shall ne-
 “ glect to make such entry, that then the fixing up
 “ of any notice, or the copy of any summons,
 “ order or rule, for such attorney, in the said
 “ master’s office, shall be deemed a sufficient ser-
 “ vice, unless the matter be such as shall require a
 “ personal service.” In conformity to this rule,
 it is usual for practisers, who live remote from the
 inns of court or chancery, to add to the place of
 their abode, the name and place of abode of some
 other person, where and with whom notices, sum-
 monses, orders, rules and other proceedings that
 do not require personal service, may be left for
 them, near to such inns^a: But when the name and
 place of abode of the attorney are entered, then
 service at that place is the proper service^o. And it
 is a rule, that no rules, orders or notices, in any
 cause or matter depending in this court, shall be
 served, or any proceedings or pleadings delivered
 or served, later than ten o’clock at night; and
 that

^a Imp. K. B. 64, 5

^o Loft, 357.

that any service or delivery thereof after that hour shall be null and void^p.

The only remaining circumstance necessary for enabling an attorney to practise, is his taking out a *certificate*; as to which it is enacted by the statute 25 Geo. III. c. 80^q. that “every attorney, &c. “admitted and enrolled in any of his majesty’s “courts at *Westminster*, or in any other court holding pleas where the debt or damage shall amount “to 40s. or more, shall previous to his commencing or defending any suit or prosecution, take “out annually a certificate of such his admission and enrolment: for which, if he shall reside in “any of the inns of court, or in the cities of *London* or *Westminster*, the borough of *Southwark*, “the parish of *St. Pancras* or *St. Mary le bone*, or “within the bills of mortality, &c. there shall be “charged a stamp-duty of *five* pounds; or if he “shall reside in any other part of *Great Britain*, “there shall be charged a stamp-duty of *three* “pounds^r: Which certificate shall be renewed, at “least ten days previous to the expiration of the “time for which it was granted, and so yearly “and every year, so long as such attorney, &c. “shall continue to practise^s.”

“And that every person who shall in his own “name, or in the name of any other person or “persons,

^p R. M. 41 G. III. 1 East, ^r § 5.
132. ^s § 7

^q § 1.

“ persons, sue out any writ or process, or com-
 “ mence, prosecute, carry on, or defend any
 “ action or suit, or any proceedings as an attor-
 “ ney, &c. in any of the courts aforesaid, for
 “ or in expectation of any gain, fee, or reward,
 “ without having obtained such certificate, in such
 “ manner as in the said act is directed, or shall
 “ deliver in to the respective officers appointed by
 “ that act, any false or fictitious place of residence,
 “ with intent to evade the payment of the higher
 “ duties by that act imposed, shall for every such
 “ offence, forfeit and pay the sum of 50*l.* and be
 “ made incapable to maintain or prosecute any
 “ action or suit, for the recovery of his fees, &c.
 “ in any court of law or equity.”* This statute
 has been held not to extend to the *county* court,
 though an attorney prosecute a suit there, by virtue
 of a writ of *justicies*, for more than 40*s.*†.

And it is by the same act declared to be law-
 ful, for any person having duly obtained a certifi-
 cate, in the manner therein directed, to sue out
 any writ, &c. in the name, and by and with the
 consent of any other attorney, &c. in writing first
 had and obtained, and signed by him, in like man-
 ner as he might have lawfully done before the
 making of that act; provided that such attorney,
 &c. in whose name such proceedings shall be insti-
 tuted, commenced, or carried on, shall also have
 first duly obtained a certificate, out of the court
 wherein

* And see the statute 37 East, 569.

Geo. III. c. 90. § 30. 4 Esp. † 6 T. R. 663

Cas. M. Pri. 14. but see 2

wherein he is sworn, admitted, and enrolled in manner aforesaid; or in default thereof, every such attorney, &c. shall be subject and liable to the like pains, penalties, forfeitures, and incapacities, as any other attorney, &c. is by that act made subject and liable to^u. And it is also declared to be lawful, for any person duly sworn, admitted and enrolled an attorney, &c. in any *two* or more of the said courts respectively, under a proper certificate obtained from either of the said courts, in such manner as in the said act is directed, to commence, carry on, prosecute, solicit, or defend any action or suit, or any proceedings, in any of the said other courts, in which he is so sworn, admitted, or enrolled, although such certificate shall or may not have issued from such other court^v.

By a subsequent statute^w, the certificate is to be taken out annually, between *November* the first and the end of *Michaelmas* term: and it is thereby enacted, that “every person admitted, sworn and enrolled in any of the said courts as aforesaid, who shall neglect to obtain his certificate thereof, in the manner before directed, for the space of one whole year, shall from thenceforth be incapable of practising in his own name, or in the name of any other person, in any of the said courts, by virtue of such admission, entry and enrolment and the admission, entry and enrolment of such
“ person

^u 25 Geo. III. c. 80. § 8. ^w 37 Geo. III. c. 90. § 26.

^v § 9.

“ person in any of the said courts, shall be from
 “ thenceforth null and void. Provided always,
 “ that nothing therein before contained, shall be
 “ construed to prevent any of the said courts from
 “ readmitting any such person, on payment to the
 “ commissioners of the duty accrued since the ex-
 “ piration of the last certificate obtained by such
 “ person, and such further sum of money by way
 “ of penalty, as the said court shall think fit to
 “ order and direct ^x.” Acts of *indemnity* however
 are occasionally passed, to relieve attornies who
 have neglected to take out their certificates in due
 time ^y.

A person having been sworn, admitted, and en-
 rolled as an attorney at *law*, may be sworn, ad-
 mitted, and enrolled as a solicitor in *equity* ^z, and
vice versa ^a, without being subject to the payment
 of the stamp-duty imposed by the statute 34 Geo.
 III. c. 14 ^b. And an attorney in any of his majesty’s
 courts of record at *Westminster*, is capable of being
 admitted to practise as an attorney in any *inferior*
 court of record, provided he be in all other respects
 capable and qualified to be admitted an attorney,
 according to the usage and custom of such inferior
 court ^c. It is also declared to be lawful, for any
 person who shall be sworn, admitted, and enrolled
 to

^x 37 Geo. III. c. 90. § 31.

^z 2 Geo. II. c. 23. § 20.

^y See the statutes 37 Geo.

^a 22 Geo. II. c. 46. § 15.

III. c. 93. 39 & 40 Geo. III.

^b § 5, 6, 7.

c. 72.

^c 6 Geo. II. c. 27. § 2.

to be an attorney, in any of his majesty's courts of record at *Westminster*, &c. by and with the consent and permission of any attorney, in any of the said other courts of record, &c. such consent being in writing, signed by such attorney, and in the name of such attorney, to sue out any writ or process, or to commence, carry on, prosecute, or defend any action or actions, or any other proceedings in such court, notwithstanding such person is not sworn or admitted to be an attorney of such court ^d. And a demand of costs by the acting attorney is good, although he act in the name of another attorney ^e.

But “ if any person, who shall be a sworn attorney of any of the courts of law aforesaid, shall knowingly and willingly permit or suffer any other person or persons to sue out any writ or process, or to commence, prosecute, follow, or defend any action or actions, or other proceedings, in his name, not being a sworn attorney of one of the said other courts of law, or a sworn solicitor of the court of chancery, or other court of equity, and shall be thereof lawfully convicted, every person so convicted shall, from the time of such conviction, be disabled and made incapable to act as an attorney, in any of the courts of law aforesaid; and the admittance of such person to be an attorney of any of the
“ said

^d 2 Geo. II. c. 23. § 10.

^e Say. Rep. 95

“ said courts of law, shall from thenceforth cease
 “ and be void ^f.” And by a subsequent act ^g, “ if
 “ any sworn attorney or solicitor shall act as *agent*
 “ for any person or persons not duly qualified to
 “ act as an attorney or solicitor, or permit or suffer
 “ his name to be any-ways made use of, upon the
 “ account, or for the profit of any unqualified per-
 “ son or persons, or send any process to such un-
 “ qualified person or persons, thereby to enable
 “ him or them to appear, act, or practise in any
 “ respect as an attorney or solicitor, knowing him
 “ not to be duly qualified as aforesaid, and com-
 “ plaint shall be made thereof in a summary way,
 “ to the court from whence any such process did
 “ issue, and proof made thereof upon oath, to the
 “ satisfaction of the court, that such sworn attor-
 “ ney or solicitor hath offended therein as aforesaid,
 “ then every such attorney or solicitor so offending
 “ shall be struck off the roll, and for ever after
 “ disabled from practising as an attorney or solici-
 “ tor; and in that case, and upon such complaint
 “ and proof made as aforesaid, it shall and may be
 “ lawful to and for the said court to commit such
 “ unqualified person, so acting and practising as
 “ aforesaid, to the prison of the said court, for any
 “ time

^f 2 Geo. II. c. 23. § 10.

^g 22 Geo. II. c. 46. § 11.

See also the statute 3 Jac. I. c. 7. § 2. and R. M. 1654. § 1. by which rule attorneys dismissed by one court from

their practice, for misdemeanors, are not after certificate to be admitted to practise in another court, it being contrary to the intent of the law.

“time not exceeding one year.” Where an attorney’s name was set to process, without his authority, the court ordered the proceedings to be set aside, and granted an attachment against the plaintiff’s attorney ^h. So where judgment was entered up by an attorney’s clerk, in the name, but without the knowledge or consent of a regular attorney, it was ordered to be set aside ⁱ.

Attornies residing in the country frequently employ *agents* in town, to prosecute and defend suits; and on the other hand, attornies in town sometimes employ agents in the country, to superintend the execution of writs, &c. Where country attornies are concerned as *principals*, declarations, pleas, and other proceedings should not be delivered and carried on in the country, but by the agents in town to whom all notices in the cause should likewise be given. 2 T. R. 711. 3 East, 569. And if the agent of, the plaintiff’s attorney give the agent for the defendant time to plead, the country attorney cannot sign judgment, till that time be expired; nor can judgment be signed in the common pleas, if an appearance be entered in the name of the agent to the defendant’s attorney, though the plea be delivered in the name of the latter. 3 Bos. and Pul. 111. Notice of trial or inquiry must be given in town, but a countermand may be given in the country ^k. Payment to the attorney is payment to the principal ^l; but it is otherwise of payment to an agent, employed by the plaintiff’s attorney ^m.

The principal *duties* of an attorney or agent are care, skill, and integrity. And if he be not deficient

^h 1 Bur. 20.

^l 1 Blac. Rep. 8.

ⁱ 5 Bur. 2560.

^m Doug. 623, 4.

cient in any of these essential requisites, he is not responsible for any error or mistake, arising in the exercise of his profession. To use the words of Lord *Mansfield*, in the case of *Pitt v. Yalden*ⁿ, “that part of the profession which is carried on by attorneys is liberal and reputable, as well as useful to the public, when they conduct themselves with honour and integrity; and they ought to be protected, where they act to the best of their skill and knowledge: but every man is liable to error; and his lordship added, he should be very sorry, that it should be taken for granted, that an attorney is answerable for every error or mistake, and liable to be punished for it, by being charged with the debt sued for. A counsel may mistake, as well as an attorney; yet no one will say, that a counsel who has been mistaken, shall be charged with the debt. The advice of a counsel is indeed honorary, and he does not demand a fee for it: the attorney may demand a compensation; but neither of them ought to be charged with the debt for a mistake. Not only counsel, but judges may differ, or doubt, or take time to consider: therefore an attorney ought not to be liable, in cases of reasonable doubt.” But in ordinary cases, if an attorney be deficient in skill or care, by which a loss arises to his client, he is liable to a special action on the case for damages^o. It is not usual, however, for the court
to

ⁿ 4 Bur. 2061.^o 2 Wils. 325.

to interfere in a summary way, on account of negligence or unskilfulness^p, except it be very gross^q; or for the misconduct of an attorney, independently of his profession.

It was formerly the duty of attornies to appear personally in court, on or before the fourteenth day of *Michaelmas* term, and on or before the seventh day of every other term^r: and they are required, when called upon, to attend the court on motions^s, the judges on summonses, and the master on appointments^t. And on every appointment to be made by the master, the party on whom the same shall be served, shall attend such appointment, without waiting for a second; or in default thereof, the master shall proceed *ex parte* on the first appointment^u. But it is a rule, that no attorney or other person shall be summoned to attend any justice of this court, nor any matters be transacted before such justice at his chambers, or elsewhere out of court, during the sitting of the court at *Westminster*; and all orders and other transactions so to be made by such justice shall be vacated^v.

Where *writings* come to an attorney's hands, in the way of his business as an attorney, the court on motion will make a rule upon him, to deliver them
back

^p 4 Bur. 2060.

^t R. H. 15 Car. II.

^q Say. Rep. 50. 169.

^u R. H. 32 G. III. 4 T.

^r R. M. 1654. § 1. R. T. R. 580.

^s 14 Car. II.

^v R. M. 11 G. I. & see R.

^s R. E. 1656. R. E. 14 T. 14 Car. II.
Car. II.

back to the party ^w, on payment of what is due to him ; and particularly, when he has given an undertaking to redeliver them . But where they come to his hands in any other manner, it was formerly held, that the party must resort to his action ^z. In a late case however it was determined, that the court under circumstances will entertain a summary jurisdiction over an attorney, in obliging him to deliver up deeds, &c. on satisfaction of his lien; though they came to his hands as steward of a court, and receiver of rents ^a: And if a third person appear to be interested in the deeds, &c. the court will take a security, from the person to whom they are delivered, to produce them on demand, for the inspection of such third person ^b. The court in some instances, will order an attorney to pay costs to his own client for *neglect* ^c; or to the opposite party, for *vexatious* and improper conduct ^d. And if a rule be made upon an attorney, for the delivery of writings, or payment of costs, &c. and it be not obeyed, the court will enforce it by *attachment*; which is also the regular mode of proceeding against an attorney, for the non-performance of his undertaking to put in bail ^e, &c.

Where

^w 1 Salk. 87.

^b *Id. ibid.*

^x Say. Rep. 125. but see 1 Str. 547.

^c Say. Rep. 50. 172.

^y 1 Str. 621. 8 Mod. 339.

^d 2 Bur. 654. and see Hul.

S. C.

Costs, 482, &c.

^z 1 Salk. 87.

^e R. M. 1654. § 10. 6 Mod

3 T. R. 275.

52. 86. 1 T. R. 422. and see Cowp. 845.

Where an attorney is charged by affidavit with any fraud or malpractice in his profession, contrary to the obvious rules of justice and common honesty, the court on motion will order him to answer the matters of the affidavit; and in general if he positively deny the malpractices imputed to him, they will dismiss the complaint; but otherwise they will grant an attachment: And in a late case, where an attorney required to answer the matters of an affidavit, swore in his exculpation to an incredible story, the court granted an attachment against him, though he positively denied the malpractices with which he was charged ^f.

The party being taken on the attachment, either remains in custody, or puts in bail before a judge, (for he is not bailable by the sheriff^g;) to answer *interrogatories*, to be exhibited against him in the crown office ^h; which interrogatories must be signed by counsel ⁱ: and after being examined thereon by the master, if he be reported in contempt, the court will pass judgment upon him, of fine ^k or imprisonment, according to the circumstances of the case; but if the report be in his favour, they will order him to be discharged, or his recognisance to be vacated ^l. And by a late rule of court ^m, if judgment

^f 6 T. R. 701.

^g 1 Str. 479.

^h 7 Mod. 31. 6 Mod. 43.

1 Str. 444. 1 Wils. 30. 3 Bur.

1257. 4 Bur. 2106. 2129. 5

T. R. 362.

ⁱ R. M. 34 G. III. 5 T.

R. 474.

^k 1 Wils. 22.

^l 3 Bur. 1257.

^m R. II. 34 G. III. 5 T.

R. 547. 723.

ment be not given the same term, the name of the cause shall be inserted in the list of motions, appointed to come on *peremptorily* in the ensuing term, in order that the court may be informed what shall have been done in prosecution of the attachment.

If an attorney has been fraudulently admittedⁿ, or his misconduct has been very gross, or if he has been convicted of felony^o, or other offence which renders him unfit to be continued an attorney, the court will order him to be struck off the roll: and if an attorney has been convicted of forgery or perjury, he is liable to be transported^p. But striking an attorney off the roll is not always understood to be a perpetual disability; for the court have in some instances permitted him to be restored, considering the punishment in the light of a suspension only^q. An attorney may also be struck off the roll at his own instance, as for the purpose of being called to the bar, &c. And if he be afterwards desirous of being restored, he must, if called to the bar, first apply to the inn of court where he was called, to be disbarred^r; and the court will make him consent to take no advantage of his privilege, in any action then depending^s.

CHAP-

ⁿ 2 Blac. Rep. 991.

^o Cowp. 829.

^p Stat. 12 Geo: I. c. 29. § 4.

^q 1 Blac. Rep. 222.

^r Doug. 114.

^s *Id.* Barnes, 42.

CHAPTER III.

Of the MEANS of COMMENCING personal ACTIONS in this Court; of the PROSECUTION and DEFENCE of them in PERSON, or by ATTORNEY, &c.; and of some THINGS NECESSARY to be done PREVIOUS to their COMMENCEMENT.

THE means of commencing personal Actions in this Court, conformably to its jurisdiction, are—

- I. By BILL of MIDDLESEX or LATITAT.
- II. By ORIGINAL WRIT.
- III. By ATTACHMENT of PRIVILEGE, at the suit of *Attornies* and *Officers* of the Court.
- IV. By BILL, which is three-fold;
 1. Against *Members* of the House of Commons.
 2. Against *Attornies* and *Officers* of the Court.
 3. Against *Prisoners*, in the actual or supposed custody of the Marshal ^a.

In

^a In the *Common Pleas*, the means of commencing personal actions are first, by *original writ*, issuing out of Chancery; which is either a *special* original, adapted to the nature of the action, or a *common* original in *trespass quare clausum fregit*: the former, though it may be had in any case, is only necessary in the first instance against *Peers*, *Corporations*, and *Hundredors*; the latter not requiring personal service, is sometimes used, where the defendant has property, which may be taken on a *distringas*, but keeps out of the way, so that he cannot be arrested, or personally served with process: Secondly, by *capias quare clausum fregit*, founded on a supposed original, which is the common

In the prosecution and defence of personal actions, the parties must appear in *person* or by *attorney*; or, in case of infancy, by *prochein amy* or *guardian*. At

common mode of commencing actions in this Court, and answers to the bill of Middlesex or *Latitat* in the King's Bench: Thirdly, by *attachment of privilege*, at the suit of *attornies* and *officers* of the court: Fourthly, by *bill*, which is two-fold; first, against *attornies* and *officers*; and secondly, against *members* of the house of commons. 2 Ld. Raym. 1442. *per Strange, arg.* and see the case of *Dawkins v. Burrigge, id. ibid.* 2 Str. 734. S. C. It has been said, that if a man be in the *Fleet*, a plaintiff may have a *bill* of debt against him, in the same manner as he can in the King's Bench, against a man in the custody of the marshal. Fitz. Abr. *Bill*, 18. 3 H. 6. 26. though *Fitzherbert* adds that it was not usual. See 3 Bos. and Pul. 12 (a). For the mode of commencing actions in the *Common Pleas*, against prisoners in the *Fleet*, see the stat. 13 Car. II. stat. 2. c. 2. § 5. and 8 & 9 W. III. c. 27. § 15.

In the *Exchequer*, the means of commencing personal actions are first, by *venire facias ad respondendum*, which is in nature of an original writ; and is the process used

against *peers* and *members* of the house of commons: On this writ the defendant is *summoned*, and if he do not appear, the next process is a *distringas*, and after that, if necessary, *analias, pluries, or testatum distringas*: Secondly, by *quo minus capias*, which answers to the bill of Middlesex or *Latitat* in the King's Bench, and *capias quare clausum fregit* in the *Common Pleas*: Thirdly, by *subpœna*, which is a process directed to the defendant, and not to the sheriff, and does not require personal service: this process is analogous to the *subpœna* in Chancery, or on the equity side of the Exchequer; and if the defendant do not appear within four days after the return of it, an *affidavit* is made of the service, upon which there issues an *attachment*, and after that, if necessary, an *alias* or *pluries* attachment, with a clause of *proclamation*; and if he still make default, a *commission of rebellion* issues, for taking him into custody by a serjeant at arms: Fourthly, by *capias of privilege*, at the suit of *attornies* and *officers* of the court: Lastly, by *bill*, against *attornies, officers* and *prisoners*.

At common law, the plaintiff and defendant must, in general, have appeared in *person*; and could not have appeared by *attorney*, without the king's special warrant, by writ or letters patent^b. But a *corporation* aggregate, not being capable of a personal appearance, could only have appeared by *attorney*, appointed under their common seal^c. And now, by the statute of *Westm.* 2. (13 Edw. I.) c. 10. a general liberty is given to the parties, of appearing by attorney^d. Yet there are certain persons, such as *feme-coverts* and *idiots*, who, for want of legal discretion, are incapable of appointing an attorney; and must therefore appear in person^e: And any one else, if he think proper, may still appear, and prosecute or defend his suit, in the same manner^f; which is usually done by attorneys and prisoners^g.

Attornies

^b Co. Lit. 128. a. 2 Inst. 349. 378. F. N. B. 25. 1 Mod. 244. 2 Mod. 83. S. C.

^c Bro. Abr. tit. *Corporation*, 28. Co. Lit. 66. b.

^d Gilb. C. P. 32, 3. 2 Inst. 376. F. N. B. 25.

^e Co. Lit. 135. b. 2 Inst. 390. F. N. B. 27. But see 2 Saund. 335. where an *idiot* appeared by her *friend*, and assigned for error, that being an idiot, she had previously appeared and defended the action by *attorney*: And note, in Co. Lit. 135. b. it is said, that the suit by *idiots*, &c. must be in their name, but

shall be followed by others. *Lunatics*, it is said, if under age, must appear by guardian; if of full age, by attorney. 4 Co. 124. b. and see Bac. Abr. tit. *Idiots and Lunatics*, G.

^f Say. Rep. 217.

^g A plaintiff may sue, in the common pleas, upon a penal statute, in his own name, without an *attorney*; and putting "*plaintiff's attorney*" after his name, in the notice on the process, is no irregularity, being only in compliance with the 5 G. II. c. 27. § 4. *Legrew v. Penny*, M. 36 G. III. C. P.

Attornies were anciently appointed in court, when actually present^h: but they are now usually appointed out of court by *warrant*, which should regularly be in *writing*; but an authority by *parol* is said to be sufficient to support a judgmentⁱ. And even if an attorney appear without warrant, it is a good appearance as to the court; though he is liable to an action^k. Where an attorney once appears, or undertakes to be attorney for another, he shall not be permitted to withdraw himself^l; and it is said to be his duty to proceed in the suit, although his client neglect to bring him money^m.

The warrant of attorney continues in force until the judgment, and for a year and a day afterwards, in order to have executionⁿ; unless it be sooner countermanded by the act of the principal, or determined by the death of the attorney. Where an attorney, having been retained, has undertaken to appear, the defendant cannot countermand the appearance after his retainer^o, nor can he change his attorney, at any time pending the suit, without leave of the court or a judge, and notice to the adverse

^h 1 Wils. 39.

^l 1 Sid. 31.

ⁱ 2 Keb. 199. 1 Lil. P. R. 134. 137.

^m Say. Rep. 173.

^k 1 Keb. 89. 1 Salk. 86.

ⁿ 2 Inst. 378. Gilb. Exec.

88. 6 Mod. 16. But see

92, 3. Run. Ej. 428.

1 T. R. 62.

^o R. M. 1654. § 10. 1 Lil. P. R. 134. 143.

adverse party or his attorney^p. If an attorney *die* pending the suit, his warrant is determined^q: but the party who employed him must have notice of his death; and if he will not appoint another attorney, his adversary may proceed in the action^r.

At common law, the warrant of attorney might have been *filed*, and entered of record, at any time before judgment^s; but there are several acts of parliament^t, requiring it to be done sooner, under severe penalties. By the last of these acts it is provided, that “the attorney for the plaintiff shall
“ file his warrant of attorney, with the proper officer, the same term he declares; and the attorney for the defendant, the same term he appears,
“ under the penalties inflicted by former laws.” Upon this act of parliament, the court made a rule^u, “that the defendant’s attorney, at the time
“ of his appearance, shall give the plaintiff’s attorney, the warrant of attorney for the defendant;
“ and at the time of delivering the copy of the declaration, or taking it out of the office, when
“ filed, shall pay four pence for the said warrant: which warrant of attorney the plaintiff’s attorney shall file, with the officer appointed for filing it, at the same time he files, or ought to
“ file

^p *Id.* 1 Blac. Rep. 8. Doug. 1 Wils. 39.

217. and see 2 Bos. & Pul. ^t 18 Hen. VI. c. 9. 32.
357. Hen. VIII. c. 30. § 2, 3. 18

^q 1 Lil. P. R. 141.

Eliz. c. 14. § 3. 4 & 5 Ann.

^r *Id.* 137. 2 Keb. 275.

c. 16.

^s 41 Ed. III. 1. b. but see ^u R. M. 5 Ann. II.

“file, the warrant of attorney for the plaintiff: “And if the defendant’s attorney refuse to pay the “same, the plaintiff’s attorney may sign judgment.” Notwithstanding these regulations however, it has been determined, that the warrants of attorney may be *filed*, so as to support the proceedings, at any time *pendente lite*, or before final judgment; though the attorney may be fined, for not filing them in due time^v. It was anciently the course of this court, to *enter* the warrants of attorney on a particular roll, kept for that purpose^w: but this course was altered in the time of *Wright*, Ch. J. who caused them to be entered on the top of the plea-roll^x, as the practice is at this day. The *want* of a warrant of attorney is *aided* after verdict^y, or judgment by *nil dicit*^z, &c. by the statutes of jeofails: and by the statute of 8 Hen. VI. c. 12. a misprision of the clerk in the warrant may be *amended*, in affirmance of the judgment^a.

It only remains to be observed, with regard to the warrant of attorney, that by a late act of parliament^b, which subjects it to a stamp-duty, “no “attorney shall sue out any writ or process, or “commence,

^v Dyer, 180. 225. Cro. Jac.

277. March, 121. 8 Mod.

77. 1 Str. 526. 2 Str. 807.

2 Ld. Raym. 1532. S. C.

Fitzgib. 191. 1 Wils. 39.

183. Doug. 115.

^w 1 Salk. 88.

^x 1 Salk. 88. R. E. 4 Jac. II.

^y 18 Eliz. c. 14.

^z 4 & 5 Ann. c. 16. and

see 1 Wils. 85.

^a Doug. 114.

^b 25 G. III. c. 80. § 15.

&c.

“ commence, prosecute, or defend any action,
 “ unless he shall have delivered to the officer or
 “ his deputy, appointed to sign or issue the first
 “ process for the plaintiff, or to enter, file, or re-
 “ cord the bail or appearance for the defendant,
 “ a *memorandum* or minute of his warrant, duly
 “ stamped; containing the names of the parties,
 “ the court, and the attorney, and, where a *præcipe*
 “ is required, (except for an original,) the nature
 “ and denomination of the process, and the return
 “ of it^c; which *memorandum* or minute the said
 “ officer or his deputy shall receive, and forthwith
 “ enter or file of record, and shall sign thereon the
 “ day of delivering it.” A similar *memorandum* or
 minute is required, by the same act, previous to
 entering up judgment on a *cognovit actionem*, or
 warrant of attorney^d.

Where the plaintiff is a *pauper*, and will swear
 that he is not worth *five* pounds, after all his debts
 are paid, except his wearing apparel, and the sub-
 ject matter of the action^e, he may be admitted to
 sue *in formâ pauperis*. But the *defendant* in a ci-
 vil action is never allowed to defend it as a pauper^f.
 It was formerly a rule^g, that none could be admit-
 ted to sue *in formâ pauperis* out of court; but now,
 if

^c Append. Chap. III. § 1, 2. the sum is said to be *ten*
^d *Id.* § 3. pounds.

^e R. H. 3 & 4 Jac. II. *reg.* ^f Hul. Costs, 220.

1. (a). Hul. Costs, 212. but ^g R. II. 3 & 4 Jac. II.
 see 2 Lil. P. R. 633. where *reg.* 1.

if a plaintiff will make *affidavit*^h that he is not worth five pounds, &c. he may, upon *petition*ⁱ to the chief justice, supported by counsel's opinion^k of his cause of action, be admitted out of court^l; which admission may be either at the commencement of the suit, or afterwards *pendente lite*^m: And upon his being so admitted, an attorney and counsel shall be assigned him, pursuant to the statute 11 Hen. VII. c. 12.; and he shall be permitted to carry on the proceedings *gratis*, without using stampsⁿ, or paying fees to the officers of the court, unless he obtain a verdict for more than five pounds, and then the officers shall be paid their court-fees, and for passing the record, &c.

Neither is a *pauper* liable to pay costs to the defendant, if he be nonsuited, or have a verdict against him: for by the statute 23 Hen. VIII. c. 15. which gives costs to the defendant upon a nonsuit or verdict, it is provided, that “every poor person, being plaintiff in any action of *debt*, &c. who
“at the commencement of his suit, shall be admitted, by the discretion of the judge or judges
“where the action is pursued, to have his process
“and counsel of charity, without paying money
“or fee for the same, shall not be compelled to
“pay

^h Append. Chap. III. § 4.

^m Say. Costs, 90. 3 Wils.

ⁱ *Id.* § 5.

24.

^k *Id.* § 6.

ⁿ Stat. 5 W. & M. c. 21.

^l R. II. 3 & 4 Jac. II. *reg.* § 14, &c.

1. (a).

“ pay any costs by virtue of this statute, but shall
 “ suffer other punishment, as by the discretion of
 “ the justices before whom the suit shall depend,
 “ shall be thought reasonable °.” It has been said,
 that if a pauper be nonsuited, he shall pay costs or
 be whipped^p; but this punishment does not ap-
 pear to have been ever inflicted^q. If the pauper
 give notice of trial, and do not proceed, or be
 otherwise guilty of improper conduct, the court
 will order him to be dispaupered^r; but until this
 be done, they will not make any rule about costs^s.
 And unless the pauper’s conduct appear to have
 been vexatious, the court will not stay the pro-
 ceedings in a second action, until the costs are paid
 of a nonsuit in a prior one, for the same cause^t;
 nor, if the pauper should succeed in the second
 action, will they deduct the costs of the first, out
 of those recovered in the second^u. But though a
pauper be not liable to pay costs, yet he is entitled
 to receive them from his adversary^v.

An *infant*, or person under the age of twenty-
 one years, must sue by his *prochein amy*, or next
 friend,

° § 2.

see Cas. Pr. C. B. 47. Pr.

^p 1 Sid. 261. 2 Salk. 506.

Reg. 405. S. C. 1 Str. 420.

7 Mod. 114.

semb. contra.

^q *Id. ibid.*

^t 2 Str. 878. 1121. 3 Wils

^r 2 Lil. P. R. 633. 2 Salk.

24. *Hutton v. Colboys*, E. 35

506. 1 Str. 420. 2 Str. 983.

Geo. III. but see 2 T. R

1122. 3 Wils. 24. 1 Bos. &

511.

Pul. 40.

^u 2 Str. 891.

^s 2 Str. 878. 983. 3 Wils.

^v 1 Bos. & Pul. 39.

24 1 Bos. & Pul. 40. but

friend^w, unless where he sues as co-executor with others, in which case it is holden, that the executors of full age may appoint an attorney for themselves and the infant, as they make together but one representative^x. And hence, he cannot be an informer upon a penal statute^y; for by the 18 Eliz. c. 5. “every informer upon a penal statute “must exhibit his suit *in proper person*, and pursue the same only by himself or his attorney.” An infant *defendant* must in all cases appear and defend by *guardian*, even where he is sued as co-executor, with others^z: And if he appear by *attorney*, it is error^a; though if an infant *plaintiff* appear by attorney, it is cured by the statutes of jeofails^b.

To constitute a *prochein amy* or *guardian*, the person intended, who is usually some near relation, should come with the infant, before a judge at his chambers; or else a *petition*^c should be presented to the judge, on behalf of the infant, stating the nature of the action, and, if for the defendant, that he is advised and believes he has a good defence thereto; and praying, in respect of his infancy, that the person intended may be assigned him, as his *prochein amy* or guardian, to prosecute or defend the

^w Co. Lit. 135. b. 2 Inst. 361. 390. F. N. B. 27.

^x 2 Saund. 212.

^y Say. Rep. 51.

^z 2 Str. 784.

^a 3 Co. 58. b. 9 Co. 30. b.

^b 21 Jac. I. c. 13. 4 & 5

Ann. c. 16.

^c Append. Chap. III. § 7

the action. This petition should be accompanied with an *agreement*^d, signifying the assent of the intended *prochein amy* or guardian, and an *affidavit*^e, made by some third person, that the petition and agreement were duly signed. On being applied to in either of these ways, the judge will grant his *fiat*, upon which a rule or order should be drawn up, with the clerk of the rules, for the admission of the *prochein amy* or guardian^f: which admission is either *special*, to prosecute or defend a *particular* action, or *general*, to prosecute or defend *all* actions whatsoever^g; though it is said, that, by the practice of this court, a *special* admission of a *guardian*, to appear in one cause, will serve for others^h.

The rule or order for admission of a *prochein amy*, should be obtained before *declaration*, and a copy thereof annexed to it; or the defendant is not compellable to pleadⁱ: and the attorney for the plaintiff, if required, must give notice to the defendant's attorney, of the place of abode of the *prochein amy*^k. In like manner, the rule or order for the admission of a *guardian* should be obtained before *plea*, and a copy of it annexed thereto; for if an infant defendant appear by attorney, though it be in consequence of common process, with a notice requiring him to appear in that manner, the

^d Append. Chap. III. § 8. Chap. III. § 12.

^e *Id.* § 9.

^h 1 Str. 305.

^f *Id.* § 10, 11.

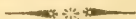
ⁱ Sty. P. R. 264

^g 1 Str. 304. Append.

^k 1 Wils. 246.

the plaintiff may obtain an order for striking out the appearance, and that the defendant appear by guardian, within a certain time, being usually four or six days; or in default thereof, that the plaintiff may be at liberty to name a guardian, to appear and defend for him¹. And a similar order may be obtained, where the defendant neglects to appear at all^m.

An infant *plaintiff* is not liable to costs, but only his *prochein amy*ⁿ; and if he refuse to pay them, on demand, he may be proceeded against by attachment^o. Yet, where an infant plaintiff was taken in execution for costs, the court refused to discharge him on motion^p. And it has been adjudged, that costs are payable by an infant *defendant*^q.



Previous to the commencement of an action, a *notice* is in some cases required to be given to the parties, against whom the action is intended to be brought, in order that they may have an opportunity of tendering amends^r. Thus, by the statute 24 Geo. II. c. 44. § 1. it is enacted, “that no writ shall be sued out against, nor any copy
“ of

¹ Barnes, 413. 418.

^o Willes, 190. Barnes, 128.

^m 2 Str. 1076. 2 Wils. 50. Pr. reg. 102. S. C.

ⁿ Cro. Eliz. 33. 1 Str. 548.

^p 2 Str. 1217. And see

2 Str. 708. And the *prochein amy* is *primâ facie* liable to the plaintiff's attorney, for

1 Bos. & Pul. 480.

his costs, as well as to the defendant. 2 Esp. Cas. *Ni.*

^q Dyer, 104. 1 Bulst. 189.

2 Str. 1217.

Pri. 473.

^r Append. Chap. III. § 13, &c.

“ of any process at the suit of a subject shall be
 “ served on, any justice of the peace, for any
 “ thing by him done in the execution of his of-
 “ fice, until *notice* in writing of such intended writ
 “ or process shall have been delivered to him, or
 “ left at the usual place of his abode, by the at-
 “ torney or agent for the party who intends to sue
 “ or cause the same to be sued out or served, at
 “ least one calendar month before the suing out or
 “ serving the same; in which notice shall be clear-
 “ ly and explicitly contained, the cause of action
 “ which such party hath or claimeth to have
 “ against such justice of the peace: on the back
 “ of which notice shall be indorsed the name of
 “ such attorney or agent, together with the place
 “ of his abode; who shall be entitled to have the
 “ fee of twenty shillings for the preparing and
 “ serving such notice, and no more.” Upon this
 statute it has been holden, that no action can be
 brought against a justice of the peace, for an act
 done by him in that character, without giving him
 a month’s notice of the *writ or process* intended to
 be sued out, as well as of the *cause of action*^s.

A similar notice is required to be given to
 officers of the excise and customs, by the 23 Geo.
 III. c. 70. § 30. and 24 Geo. III. sess. 2. c. 47.
 § 35. upon which statutes it has been holden, that
 the month begins, the day on which the notice is
 served^t; and that an excise officer is entitled to no-
 tice, before an action is brought against him, for an
 act

^s 7 T. R. 631.

^t 3 T. R. 623.

act not warranted by his official capacity, if done *bonâ fide*, in the supposed execution of his duty, such as the assaulting of an innocent person, whom he suspects to be a smuggler, employed in running goods ^u.

A *demand* is also in some cases necessary to be made, previous to the commencement of the action ^v. Thus, by the statute 24 Geo. II. c. 44. § 6. “no action shall be brought against any
“ constable, headborough, or other officer, or
“ against any person or persons acting by his or-
“ der and in his aid, for any thing done in *obedi-*
“ *ence* to any warrant under the hand or seal of
“ any justice of the peace, until *demand* hath been
“ made, or left at the usual place of his abode, by
“ the party or parties intending to bring such ac-
“ tion, or by his, her, or their attorney or agent,
“ in writing, signed by the party demanding the
“ same, of the perusal and copy of such warrant,
“ and the same hath been refused or neglected
“ for the space of six days after such demand:
“ And in case after such demand and compliance
“ therewith, any action shall be brought against
“ such constable, &c. without making the justice
“ or justices who signed or sealed the said warrant
“ defendant or defendants, that on producing and
“ proving such warrant at the trial of such action,
“ the

^u 5 T. R. 1. and see 2 Esp.
Cas. N. P. 542

^v Append. Chap. III. §
18. 19

“ the jury shall give their verdict for the defendant
 “ or defendants, notwithstanding any defect of ju-
 “ risdiction in such justice or justices.”

“ And if such action be brought jointly against
 “ such justice or justices, and also against such
 “ constable, &c.; then on proof of such warrant,
 “ the jury shall find for such constable, &c. not-
 “ withstanding such defect of jurisdiction as afore-
 “ said: And if the verdict shall be given against
 “ the justice or justices, in such case the plaintiff
 “ or plaintiffs shall recover his, her, or their costs
 “ against him or them; to be taxed in such man-
 “ ner, by the proper officer, as to include such
 “ costs as the plaintiff or plaintiffs are liable to
 “ pay to the defendant or defendants, for whom
 “ such verdict shall be found.”

The intent of these provisions was to prevent the constable or other officer, when acting in *obedience* to his warrant^w, from being answerable, on account of any defect of jurisdiction in the justice: Therefore if an officer seize goods, in obedience to the warrant of a magistrate, whether that warrant be legal or not, he cannot be sued, until a previous demand has been made of a copy of it^x. An action of *replevin* to recover damages, is holden to be an action within the meaning of the
 above

^w 3 Bur. 1742. 3 Esp.
 Cas. *Ni. Pri.* 226.

^x 2 Bos. & Pul. 158. 5
 Esp. Cas. *Ni. Pri.* 96. S. C.

above statute^y. And it has been determined, that a *churchwarden* or overseer of the poor taking a distress for a poor's rate, under a warrant of magistrates, is entitled to the protection of the statute, in having the magistrates made defendants with him, in an action of trespass^z. But the act extends only to actions of *tort*: and therefore where an action for money had and received was brought against an officer, who had levied money on a conviction by a justice of the peace, the conviction having been quashed, it was holden that a demand of a copy of the warrant was not necessary^a. In cases to which the act applies, if the plaintiff's attorney make out two papers precisely similar, purporting to be demands of a copy of the warrant, pursuant to the statute, and sign both for his client, and then deliver one to the defendant, the other will be sufficient evidence at the trial^b.

^y Willes, 668.

^a Bul. *Ni. Pri.* 24.

^z Bul. *Ni. Pri.* 24. 7 T. R.
270.

^b 2 Bos. & Pul. 39.

CHAPTER IV.

*Of the BILL of MIDDLESEX and LATITAT, and
SUBSEQUENT PROCESS thereon.*

A BILL of *Middlesex* or *Latitat* is the ordinary mode of commencing actions in this court, against unprivileged persons: and a *latitat*, being a kind of *original* in the King's Bench^a, may be issued in the first instance, without previously suing out a bill of *Middlesex*^b. But this mode of commencing actions is not applicable to *peers* of the realm, (1) *corporations*, or *hundredors* on the statutes of hue and cry, &c. who not being subject to a *capias*, must be sued by original writ; nor to *members* of the house of commons, who for the same reason must be sued by *original* writ, or by *bill* for the real cause of action, stating them to have privilege of parliament. And there is no need of any process for commencing actions against *attornies* or officers, who are supposed to be already present in court; nor against *prisoners* in the actual custody of the marshal.

Anciently, it seems, the process in *trespass* was
founded

^a Carth. 233. 2 Ld. Raym. 1241. 1 Blac. Rep. 312. S. C. 883. Cowp. 456. 2 Blac. Rep. 925.

^b Sty. Rep. 156. 178. 1 Sid. (1) 3 East, 127. In this case, 53. 60. Carth. 233. 2 Ld. a writ of *latitat* issued against Raym. 880. 1 Str. 550. 2 Str. a peer was superseded on motion, founded on an office-copy 736. 2 Ld. Raym. 1441. S. C. of the *præcipe*, in which the Willes, 258. 2 Bur. 961. 1 defendant was styled *baron*. Blac. Rep. 215. S. C. 3 Bur.

founded on a *plaint* or *queritur*^c, entered on the records of the court: and the first process thereon was a precept in nature of an *attachment*^d; upon which the sheriff returned, either that he had attached the defendant^e, or that he had nothing by which he could be attached^f. On the latter return, if the defendant did not appear, there issued into *Middlesex*, or other county where the court sat, a precept in nature of a *capias*, commanding the sheriff of that county to take the defendant, if he should be found in his bailiwick, and safely keep him, so that he might have his body before the king, at a certain time and place therein mentioned, to answer the plaintiff, in a plea of *trespass*^g, &c. This precept, being now used as the first process in trespass, when the defendant is in *Middlesex*, is therefore called a *bill of Middlesex*. If the defendant cannot be arrested upon, or served with a copy of this process, the plaintiff may sue out an *alias*^h, and after that (if necessary) a *pluries* bill

^c Append. Chap. IV. § 1. Rich. Pr. K. B. 24. 2 H. In Trye's *Jus. Fil.* published Blac. 271, 2.

in 1684, it is said, that there were several files of these complaints, then remaining in the former upper treasury of this court; and the profits arising from them were formerly so considerable, that they were always excepted by the chief justice, out of the grant of the office of *custos brevivium*, p. 98, 100. See also

^d Trye, 99. Stat. 8 Eliz. c. 2. Brown's *Vade Mecum*, 526. and see Append. Chap. IV. § 2.

^e Append. Chap. IV. § 3.

^f *Id.* § 4.

^g *Id.* § 6. 15.

^h But an *alias* writ, being founded on the sheriff's return of *non est inventus*, cannot be

bill of Middlesex; commanding the sheriff, as *before*, or as *oftentimes*, he has been commanded, to take the defendant, &c.¹

But if the defendant be not in Middlesex, the plaintiff must sue out a writ of *latitat*, or *testatum* bill of Middlesex, directed to the sheriff or sheriffs of the county where he is supposed to be, reciting the former process and its return, and suggesting that it is sufficiently *testified* the defendant lurks, and secretes himself in their county¹. This writ may be issued in the first instance^m; and if it prove ineffectual, the plaintiff may sue out an *alias*, and after that (if necessary) a *pluries latitat*, or, more properly speaking, an *alias* or *pluries capias*ⁿ, (for these writs do not contain any *testatum*, or suggestion of a *latitat*); and the *pluries* may be repeated, from time to time, till the defendant be arrested, or served with a copy of it: though, according to some books^o, there must be a new *latitat*, after four terms from the time of suing out the first. In any of these writs, there may be a clause of *non omittas*, commanding the sheriff, that he do not *omit*, on account of any liberty in his county, but

be sued out, where the service of the first is complete. *Holway v. Whalley*, T. 41 G.

III.

¹ Append. Chap. IV. § 9.

17.

* Trye. 99

¹ Append. Chap. IV. § 11.

21.

^m *Ante*, 77.

ⁿ Append. Chap. IV. §

13. 24.

^o Hans. introd. 1. *Prac. epit.*

K. B. 2. *Tamen quere*

but that he enter the same, &c.^p. And every subsequent writ should correspond with that which has gone before, in the names of the parties: Therefore, in a late case, where an action was brought against *Bates* and another, for an act done by them as justices of the peace, and the *latitat* against *Bates* was by the name of *William*. and the *alias* by the name of *John*, the court thought the proceedings irregular, and set them aside, as far as they respected *Bates*^q.

The plaintiff was formerly allowed to join four defendants, for separate causes of action, in one writ; and to declare against them severally^r. And this is still allowed, where the process is not bailable^s. But where the process is bailable, a plaintiff cannot now join several defendants in one writ, for distinct causes of action^t. And if the plaintiff hold two defendants to bail, on a joint writ, and declare against them severally, the court will set aside all the proceedings^u.

The bill of Middlesex, and other process into that county, are issued out of the bill of Middlesex office, and signed by the clerk, but not sealed. The *latitat*, and other process thereon, are issued and signed by the signer of the writs, in the King's Bench

^p Append. Chap. IV. § 19. G. III. 4 T. R. 697.

26.

^t *Holland v. Johnson*, 4 T

^q 3 T. R. 660.

R. 695. *Holland v. Richards*.

^r Com. Rep. 74. 4 T. R. T. 32 G. III. 4 T. R. 697

696.

^u 5 T. R. 722.

^s *Yardley v Burgess*, T. 32

Bench office, and afterwards sealed at the seal office. And every clerk, according to ancient orders, was upon the signing of every writ of *alias* & *pluries capias*, and of every *non omittas*. to subscribe under the same, the term when the *latitat* was sued forth; and no such writ could be signed in term time, before a note was delivered in, subscribed with the term when the *latitat* was sued forth, for the entering of the same; and in the vacation time, the clerks were to enter every such writ, before it was signed^v. At the time of issuing the bill of Middlesex or *latitat*, &c. the plaintiff's attorney should deliver to the officer a *præcipe*^w, or note of instructions; together with a *memorandum* or minute of his warrant, duly stamped^x. And it is usual to make the affidavit of the cause of action, at the same time, before the officer or his deputy.

In point of form, the bill of Middlesex and *latitat*, &c. are *common* or *special*. Before the making of the statute 13 Car. II. stat. 2. c. 2. a defendant might have been arrested, and holden to bail, for any sum of money, upon a *common* bill of Middlesex, or *latitat*, &c. not expressing the particular cause of action. It consequently happened, that he was frequently arrested, and holden to bail or imprisoned,
for

^v R. T. 1656. reg. 1.

^x 25 Geo. III. c. 80. § 13.

^w Append. Chap. IV. § 5. and see Append. Chap. III.

8. 10. 12. 14. 16. 18. 20. 23. § 1.

25. 27.

for a large sum of money, when perhaps there was no real plaintiff, or little or no cause of action. To remedy this mischief, it was enacted, that “no
 “person arrested by any sheriff, &c. by force or
 “colour of anyailable writ, bill or process,
 “issuing out of this court, wherein the certainty
 “and true cause of action is not expressed parti-
 “cularly, shall be compelled to give security for
 “his appearance, in any penalty or sum of money,
 “exceeding the sum of forty pounds.” This statute, says Mr. Justice *Blackstone*^a, (without any such intention in the makers.) had like to have ousted the King’s Bench of all its jurisdiction over civil injuries without force; for as the bill of Middlesex was framed only for actions of trespass, a defendant could not be arrested and holden to bail thereupon, for breaches of civil contracts. But notwithstanding this statute, the defendant might still be arrested, and holden to bail, upon a common bill of Middlesex, or *latitat*, &c. for any sum not exceeding forty pounds”. And where it was for a larger sum, a method was devised, to preserve the jurisdiction of the court, and at the same time to authorize an arrest, by inserting in the process an *ac-etiam*, or special clause beginning with these words, shortly describing the true cause of action, in addition to the general complaint of trespass.

^b See the preamble to the c. 2. and see 2 East, 305, 6 statute.
^a 3 Blac. Com. 287

^c Stat. 13 Car. II. stat. 2. ^b 1 H. Blac. 310

trespass^c. And a rule of court was made upon this statute, that no attorney should make any precept or writ, with a clause of *ac-etiam*, &c. against any heir, executor, or administrator, nor in any case where, by the course of the court, special bail was not required^d.

In *trespass* therefore, and other cases, where the defendant either cannot, or is not meant to be arrested, and held to special bail, the process in general is in the *common* form, requiring the defendant to answer the plaintiff in a plea of *trespass*. This description of the plea however, though it was heretofore material^e, is now considered as mere matter of form: Therefore, where a motion was made to stay the proceedings on a bill of Middlesex, which was in *debt* only, and not in *trespass*, with an *ac-etiam* in *debt*, the court ordered the bill to be amended, by inserting the plea of *trespass*^f. In a subsequent case^g, where the bill of Middlesex was to answer the plaintiff in a plea of *debt*, instead of *trespass*, and also to a bill to be exhibited in a plea of *trespass* upon the *case*, the court refused to grant a rule for setting it aside, on the authority of a case, which was read from the master's note book, exactly in point^h. Where

^c Trye, 102, 3. and see
R. H. 2 G. II. reg. 1, 2.
2 East, 307. Append. Chap.
IV. § 29, &c.

^d R. M. 15 Car. II. § 2.

^e 2 Str. 1072.

^f 1 Blac. Rep. 462.

^g 2 T. R. 513.

^h M. 20 G. III. The same application was also refused in H. 24 G. III. 2 T. R. 513. (a).

Where the cause of action is of a bailable nature, and it is intended to arrest the defendant, and hold him to special bail for a larger sum than 40*l.* there should be a clause of *ac-etiam* in the process: And in such case, an omission in the *ac-etiam* part of the writ, of the sum for which the defendant is arrested, is irregular, and he cannot be holden to special bail thereonⁱ. There are also some cases, in which the cause of action must be expressed in the process, though the defendant be not arrested, and held to special bail: Thus, in an action on the *lottery* act, the amount of the penalties sued for must be specified in the first process; even though the defendant be not holden to bail thereon^k. And where a writ is sued out upon a recognisance of bail, it is necessary, by rule of court^l, that after the words “*in a plea of trespass,*” there should be inserted the following clause, “*and also to a bill of the said plaintiff, against the said defendant, in a plea of debt upon recognisance, according to the custom of our court before us, to be exhibited;*” otherwise the defendant or his attorney is not bound to accept of a declaration in debt upon such recognisance.

The bill of Middlesex, being merely a *precept*^m,
has

ⁱ 2 East, 305.

^k 4 T. R. 349. 577. 6 T. R. 617.

^l R. E. 15 G. II. This rule applies to the form of the *latitat*, and other subsequent process. In a bill of Mid-

dlesex, the form is, “*in a plea, &c. according to the custom of the court of the lord the king, before the king himself, to be exhibited.*”

^m Trye, 97. 2 Sid. 129; 2 Str. 1069.

has no direction or teste. But the writ of *latitat*, and other subsequent process, should be directed to the sheriff, or sheriffs of the county, where the defendant is supposed to reside ¹; or, if the sheriffs be parties, to the *coroner* ²; and if they also be parties, to *elisors* named by the master. (1) It was formerly holden, that a writ of *latitat*, &c. did not run into *Wales* ³, or the *counties palatine* ⁴; but a different practice now prevails ⁵: which practice is recognised, as to *Wales*, by the statute 13 Geo. III. c. 51. ⁶; and with respect to the *counties palatine*, the true meaning of the expression *breve domini regis non currit*, &c. is said to be, that the court cannot write directly to the sheriff, as they do in other cases ⁷. In a county palatine therefore, the *process* should be directed to the proper officer; as in *Durham*, to the *Bishop*, or his chancellor; in *Cheshire*, to the *chamberlain*, or his deputy; and in *Lancashire*, to the *chancellor*, or his deputy ⁸: In these cases, the mandatory part of the writ is different from the common form ⁹; and
if

ⁿ Append. Chap. IV. § 41.

^r Doug. 213.

^o *Id.* § 42. 1 Blac. Rep.

^s *Id.* in notis.

506. — *v. Philips*, E. 42

^t 2 Str. 1089. Andr. 191.

Geo. III. S. P.

S. C. See also R. T. 21 Car.

^p 1 Wils. 193.

I. 6 T. R. 71. Harg. tracts,

^q T. Raym. 206. 1 Lev.

417, &c.

256. 291. 2 Saund. 193. S. C.

^u Append. Chap. IV. § 43.

See also Hetl. 18. Cro. Jac.

^w *Id.* § 28.

484. 2 Bulst. 54. 156.

(1) 3 East, 141.

if the officer, to whom it is directed, refuse to receive it, he is liable to an attachment^x. In a *cumque-port*, the process is directed to the *constable* of Dover-castle, his deputy or lieutenant^y; and in *Berwick* upon Tweed, to the mayor and bailiffs of *Berwick*. In the isle of *Ely*, the process out of the court at *Westminster* goes in the first instance to the sheriff of *Cambridgeshire*, who thereupon issues his mandate to the bailiff of the franchise. 3 East, 128.

The *latitat*, and other subsequent process, should be tested in the name of the chief-justice, or senior judge of the court, if there be no chief justice; and it may be tested before the cause of action^z. If it be sued out in *term* time, it is usually tested on the first day of that term; and if sued out in vacation, on the last day of the preceding one^z: for if tested in vacation, it is altogether void^c. A Bill of Middlesex may be stated in pleading, to have been sued out of the court at *Westminster*, on a day between the *essoin*-day, and the *quarto die post*; for though the courts do not actually sit on the *essoin* day, yet in law it is considered as the first day of the term^d. And this, and every other process by bill, must be made returnable on a *particular* return-day or day *certain*, in term time;

^x 2 Str. 1089.

Pul. 235.

^y Append. Chap. IV. § 44.

^b 3 Keb. 214. T. Jon. 149.
1 Ventr. 363. 2 Bur. 962.

^z *Id.* § 46.

^c 2 Bur. 954. 967. 5 Bur.

^a 2 Bur. 967. So may a *capias* in the common pleas.

2588. 2 Blac. Rep. 683.
S. C.

1 Bos. & Pul. 343. 2 Bos. &

^d 3 T. R. 183.

time^e; as on *Monday*, or some other day of the week, *next after* the precceding general return; and it may be made returnable *on* the general return, by specifying the day of the week on which it falls, as on *Monday* in eight days of Saint Hilary, &c.^f. But it must not be returnable on a *dies non juridicus*; as on a *Sunday*, the feast of the *Purification* in Hilary term, *Ascension-day* in Easter term, or *Midsummer-day* (if it happen) in Trinity term, unless it be on the *Friday* next after Trinity Sunday, in which case it is *dies juridicus* by the 32 Hen. VIII. c. 21^g. It should also be observed, that as there are more than seven days between the morrow of All Souls and the morrow of Saint Martin, in Michaelmas term, the day before the morrow of Saint Martin, being the 11th of November, is not the day of the week *next* after the morrow of All Souls; and therefore on this day, the bill of Middlesex, or other process, should be made returnable on *Monday* (or other day of the week, being) *the feast of Saint Martin*. And there is no necessity for any particular number of days, between the teste and return of a *latitat*, or other process by bill: even one was formerly deemed

^e 1 Str. 399.

17. 6 Mod. 252. 1 Blac. Rep.

^f Append. Chap. V. § 14.

529. and see R. T. 35 Geo.

^g 2 Inst. 264, 5. Cro. Jac. III.

16. 2 Bulst. 242. 7 Mod.

ed sufficient^h; and it may be now sued out on the very return dayⁱ.

It will here be proper to take notice of some things that are required, by act of parliament, to be set down, subscribed to, or indorsed upon the process^k. And first, by the statutes 5 & 6 W. & M. c. 21. § 4. and 9 & 10 W. III. c. 25. § 42. made for preventing abuses committed by arresting persons, without any writ or legal process to justify the same, and by that means evading the stamp-duties thereon; “the officer, who shall
“sign any writ or process, to arrest any person or
“persons before judgment, shall, at the signing
“thereof, set down upon such writ or process,
“the day and year of his signing the same^l.” And by a subsequent statute^m, made for the like purposes, “every warrant, issuing upon any such
“writ or writs, shall have the same day and year
“plainly and distinctly set down thereon, as shall
“be so set down on the writ itself.”

The indorsement of the *date* is said to be no part of the writ; and therefore, if the *teste* be right, the court will not set aside the proceedings, for a mistake of the indorsementⁿ. But where,
in

^h 2 Str. 917. 2 Barnardist. K. B. 60. S. C.

ⁱ 4 T. R. 610. but see 2 Ld. Raym. 772. 2 Salk. 421. 7 Mod. 12. S. C.

^k These things are not peculiar to the bill of Middle-

sex and *latitat*, &c. but equally apply to the process by *original* writ.

^l Append. Chap. IV. § 7. 16. 22.

^m 6 G. I. c. 21. § 54.

ⁿ 1 Wils. 91.

in an action against an attorney for negligence, in not proceeding to judgment and execution in due time, the bill of Middlesex against the original defendant (having no *teste*) was stated, under a *videlicet*, to have issued on the 24th of January 1785, returnable on *Monday* next after fifteen days of St. Hilary in the same year, which was really the fact; but by a mistake of the indorsement, it appeared in evidence to have issued on the 24th of January 1784; the plaintiff was nonsuited: and on a motion for a new trial, the court were of opinion, that the time of proceeding against the original defendant depending on the return of the writ, the *return* became material, and therefore the variance was fatal °.

A further regulation was made by the statute 2 Geo. II. c. 23. § 22. which enacts, that “ every
 “ writ and process, for arresting the body, and
 “ every writ of execution, or some label annexed to such writ or process, and every warrant that shall be made out thereon, shall, before the service or execution thereof, be subscribed or indorsed with the name of the attorney, clerk in court, or solicitor, written in a common legible hand, by whom such writ, &c. respectively shall be sued forth^p: and where such attorney, &c. shall not be the person *immediately* retained or employed by the plaintiff, then also with the name of the attorney, &c. so
 “ *immediately*

° 1 T. R. 656.

^p Append. Chap. IV. § 16. 22.

“ *immediately* retained or employed, to be sub-
 “ scribed or indorsed and written in like manner.
 “ And that every *copy* of any writ or process, that
 “ shall be served upon any defendant, shall, be-
 “ fore the service thereof, be in like manner
 “ subscribed or indorsed, with the name of the
 “ attorney or solicitor, who shall be *immediately*
 “ retained or employed by the plaintiff.”

But, by the statute 12 Geo. II. c. 13. § 4.
 “ the not subscribing or indorsing the name of
 “ the attorney, &c. on any warrant, that shall be
 “ made out upon any writ, &c. shall not vitiate
 “ the same; but such writ, &c. and all proceed-
 “ ings thereon, shall be as valid and effectual,
 “ notwithstanding such omission, as if the pre-
 “ ceding act had not been made: provided the
 “ writ, whereon such warrant is made out, be
 “ regularly subscribed or indorsed, according to
 “ the act^a.” Since the making of this statute,
 though the omission of the attorney’s name upon
 the *warrant*, which is the act of the sheriff, will
 not vitiate the proceedings^r, yet, if it be not
 subscribed to or indorsed on the writ or *copy*^s,
 they may be set aside for irregularity.

If the process be defective in point of form^t, or
 in

^a See R. T. 1 G. II. (b).

^r Barnes, 414.

^s *Id.* 415. *Wright* and an-

other *v.* *Willes*, M. 21 G.
 III. *Per Cur.* T. 29 G. III.

^t 3 T. R. 660.

in its direction^u, teste^v, or return^w, or the attorney's name be not indorsed upon it^x, the defendant may move the court to set aside the proceedings. But he cannot take advantage of any error or defect in the process, after he has appeared to it^y, or taken the declaration out of the office^z: for it is the universal practice of the court, that where there has been an irregularity, if the party overlook it, and take subsequent steps in the cause, he cannot afterwards revert back and object to it^a. And, in general, the process may be *amended*, where there is any thing to amend by^b.

Before or immediately after the end of every term, the sheriff is required, by an old rule^c, to deliver and return into court all writs of *latitat*, and writs thereupon issuing. And when a writ is sued out to avoid the statute of limitations, it should regularly be *entered* on a roll, and docketed, with the sheriff's *return*, and *continuances* to the time of declaring^d. If there be two writs, the
 plaintiff

^u 1 Blac. Rep. 506. Barnes, 167. 415.

422.

^z Cas. temp. Hardw. 242.

^v 2 Bur. 954. 967. 5 Bur. 2 Str. 1072. *Wright* and another v. *Willes*, M. 21 G. III. C. Barnes, 407, 8, 9. 420.

^a 1 East, 78.

^w 1 Str. 399.

^b 1 T. R. 782.

^x *Wright* and another v. *Willes*, M. 21 G. III. *Per Cur.* T. 29 G. III. Barnes, 415.

^c R. E. 6 Jac. I.

^d Append. Chap. IV. § 46, 7, 8. and see Append. Chap. VI. § 9. Chap. XII. § 9.

^y 1 Str. 155. Barnes, 163.

plaintiff cannot give them in evidence, without shewing the first to be returned^c; for until that be done, the court is not in possession of the cause, so as to award an *alias* or *pluries* for bringing the defendant into court^f: But if there be only one writ, and the plaintiff declare thereon within a year after it is returnable, he may give the writ in evidence, without shewing it to be returned^g. The writ should be entered on a roll of that term in which it was returnable; and the roll docketed with the clerk of the judgments, and afterwards filed in the treasury of the court. In replying to a plea of the statute of limitations, except by *original*^h, the plaintiff should shew that the cause was regularly continued, by *vicecomes non misit breve*, from the return of the writ, to the time of declaringⁱ. But these continuances are mere matter of form, and may be entered at any time^k: It has even been holden, that they may be made by the attornies in their chambers^l.

^c 6 T. R. 617. 2 Bos. & S. C. 1 Lutw. 260. 1 Ld. Pul. 157. Raym. 435. S. C. and see 3

^f 7 Mod. 3. 1 Lutw. 260. T. R. 662.

1 Ld. Raym. 435. S. C. 2 ^k *Bates qui tam v. Jenkinson*, E. 24 G. III. 6 T. R. Ld. Raym. 883. Willes, 255.

^g 7 T. R. 6. 2 Bos. & Pul. 257. 618. 7 T. R. 618. 157.

^h 1 Wils. 167, 8.

ⁱ 1 Sid. 53. 60. and see 2 Salk. 590.

^l 1 Show. 366. 2 Salk. 420.

CHAPTER V.

*Of the ORIGINAL WRIT; and PROCESS thereon,
previous to the CAPIAS.*

AN *original writ* is a mandatory letter from the king in chancery, sealed with his great seal ^a; and may be the means of commencing all personal actions, against every person not being an attorney or officer of the court, or a prisoner in the actual custody of the marshal.

Formerly indeed, it was not usual to proceed in the King's Bench by original writ, in *debt*, *detinue*, or other action of a mere civil nature ^b: But the modern practice is different ^c; and in Lord *Mansfield's* time, when the defendant pleaded to the jurisdiction, in an action of *debt* commenced by original writ, the court gave judgment on demurrer for the plaintiff; and declared, that if such a plea should come before them again, they would inquire by whom it was signed ^d. On the other hand, an original writ seems to have been formerly the only way of proceeding against *peers* and *members* of the house of commons ^e: as it is still, against the

^a Finch, L. 237. 3 Blac. Com. 273. speaks of actions of *debt*, &c. depending by *original writ*,

^b 4 Inst. 76. Trye, 55. 77. 3 Blac. Com. 42. in the King's Bench, as well as in the Common Pleas.

^c Cas. temp. Hardw. 317. ^e Trye, 9. 13. Lil. Ent

^d See also the statute 13 21. 2 H. Blac. 267. 299. Car. II. st. 2. c. 2. § 6. which

the former, and also against *corporations*, or *hundredors*, on the statutes of hue and cry, &c.[†]; or where, by reason of the defendant's being abroad, or keeping out of the way, he cannot be arrested or served with process.

Another benefit attending this mode of proceeding is, that after judgment in an action by original, a writ of error will not lie in the exchequer-chamber, where it is often brought for the mere purpose of delay, but only in parliament^g. The reason is, that at common law, no writ of error lay, except in parliament, from the judgment of this court; and the statute^h which gave a writ of error in the exchequer-chamber, only extends to such actions as are *first* commenced in the King's Bench: therefore, though a writ of error will lie in the exchequer-chamber, on a judgment by *bill*, which originates in the King's Bench, yet it is otherwise where the judgment is upon an *original* writ, which issues out of chancery, where the action in that case is first commencedⁱ. But in order to save the great and unnecessary expence of suing forth *special* writs, in small and trifling suits, it is enacted^k, that “no special writ or process shall be issued out of any superior court, where the cause of action shall not amount to the sum
“ of

[†] Frye, 11.

^g Run. Ej. 205, 6. Gilb.

^h 1 Sid. 424. Trye, 6. 2 K. B. 319.

H. Blac. 304.

^k Stat. 5 Geo. II. c. 27. §

^h 27 Eliz. c. 8.

3. § Bur. 1484.

“ of *ten* pounds or upwards.” And by a late rule¹, “ in all actions in which the plaintiff shall
 “ proceed against the defendant by special origi-
 “ nal writ, and shall recover less than the sum of
 “ *fifty* pounds, he shall not, on taxing costs, be
 “ allowed any more or other costs, than he would
 “ have been entitled to, in case he had proceeded
 “ by bill; except in such actions, in which he
 “ could not proceed by bill, or in which any de-
 “ fendant shall be actually outlawed.”

Original writs are calculated for the *commence-
 ment* or *removal* of actions^m. And they are either
de cursu, or *magistralia*ⁿ: the former were framed
 in the king's court, before the division of it, by
magna charta^o, and are to be found in the *register*
 of original writs^p; the latter were made out by the
masters in chancery, pursuant to the statute of
 Westm. 2. (13 Edw. I.) c. 24. by which it is
 enacted, that “ whenever it shall happen in Chan-
 “ cery, that in one case a writ is found, and not
 “ in a similar case, falling under the same law, and
 “ requiring the like remedy, the clerks of the
 “ Chancery shall agree in making a writ, or refer
 “ the plaintiffs to the next parliament.”

In actions of *account*, *covenant*, *debt*, *annuity*, and
detinue,

¹ R. M. 23 Geo. III.

^o c. 11.

^m Trye, 1. 12. 93.

^p 1 Inst. 16. b. 73. b. Gilb.

ⁿ Gilb. K. B. 312. 1 Inst. C. P. 4, 5. 3 Blac. Com
 34. b. 73. b. 2 Inst. 407. 670. 183.

⁷ Co. 4. a. 8 Co. 48, 9.

detinue, the original writ is called a *præcipe*^q; by which the defendant has an *option* given him, either to do what he is required, or show cause to the contrary: but in *assumpsit*, and actions for wrongs, it is called a *pone*, or *si te fecerit securum*; by which the defendant is *peremptorily* required to shew cause, in the first instance. In point of form, the original writ is special or general, *nominatum vel innominatum*^s: The former contains the time, place, and other circumstances of the demand, very particularly; the latter, only a general complaint, without expressing the particulars, as the writ of trespass *quare clausum fregit*, &c.

The original writ is issued by the *cursitor*, who is so called from the writs *de cursu*; and where no *capias* lies, as against peers or members of the house of commons, or against corporations, or hundredors on the statutes of hue and cry, &c. it is necessarily the first proceeding in the cause. And where a *capias* lies, but the defendant absconds, or keeps out of the way, so that he cannot be arrested, or served with process against his *person*, it is usual to sue out an original writ, as a foundation of process against his *goods*, or in order to proceed to *outlawry*. But in all other cases, the practice is for the plaintiff's attorney to make out a *præcipe*^t for
an

^q Append. Chap. V. § 2. 4. ^s 1 Bac. Abr. 29. Gilb.

^r *Id.* § 42. and see Finch, C. P. 3.

L. 257.

^t Append. Chap. V. § 1. 3. 5.

an original writ, and deliver it to the *filazer*, who thereupon issues the *capias* in the first instance, keeping the *præcipe* as instructions for the original, which is not in fact issued, unless it become necessary, in consequence of a writ of error upon a judgment by default. On suing out the original writ or *capias*, where the plaintiff's demand exceeds forty pounds, a *fine* is payable to the king, by way of composition for the liberty of suing in his court^u; which fine is estimated according to the amount of the demand, being six shillings and eight-pence for every hundred marks, or ten shillings for every hundred pounds^v.

The original writ should be *directed* to the sheriff, or sheriffs of the county where the action is brought, and intended to be tried; and it should be *teste'd* or witnessed in the king's name at *Westminster*, or wherever else the chancery is holden^w; and as that court is supposed to be always open, it may be teste'd in vacation, as well as in term time^x. The *terms* are those times or seasons of the year, which are set apart for the dispatch of business, in the superior courts of common law. The history of these

^u Gilb. C. P. 7.

conspiracy, false-judgment,

^v Trye, 58, 9. R. H. 6

and *dedimus potestatem*. Same rule, (*a*).

W. & M. A fee of 6s. 8d. is

^w Finch, L. 237. 3 Blac. Com. 274.

also payable to the King, on every writ of *recordari*, *pone*,

^x Trye, 59, 60. Sty. Rep.

uccedas ad curiam, (except of cattle and chattels) attain,

402. 3 Keb. 214.

these terms is given by Sir *Henry Spelman*^y, who has clearly and learnedly shewn, that they were gradually formed from the canonical constitutions of the church; being indeed no other than those leisure seasons of the year, which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural business. There are four terms in the year; which are called, from some festival or saint's days, preceding their commencement, the terms of Saint *Hilary*, of *Easter*, of the Holy *Trinity*, and of Saint *Michael*. *Hilary* term begins on the octave of Saint Hilary, or the eighth day inclusive after the feast day of that saint, which falling on the 13th of January, the octave therefore, or first day of Hilary term, is the 20th of January; and it ends on the 12th of February following, unless it happen on a Sunday, and then on the 13th of February. *Easter* term begins in fifteen days of Easter, being the *Sunday* fortnight after that festival; and ends on *Monday* before Whitsunday. *Trinity* term, which was abridged by the statute 32 Hen. VIII. c. 21. begins on the morrow of the Holy Trinity, being the *Monday* next after Trinity Sunday; and ends on the *Wednesday* three weeks after, unless it happen on the 24th of June, and then on the day following. *Michaelmas* term, which was abridged by the statute 16 Car. I. c. 6., and still further by the 24 Geo. II. c. 48., begins on the morrow of All Souls,
being

^y *Jan. Ang.* 1. 2. § 9. and see 3 Blac. Com. 275.

being the 3d of November, except it be on a *Sunday*, and then on the next day; and ends on the 28th of November following, if not a *Sunday*, otherwise on the 29th. Of these terms it may be observed, that *Michaelmas* and *Hilary* are *fixed* terms, and invariably begin on the same day of the year; but *Easter* and *Trinity* terms are *moveable*, their commencement being regulated by the feast of *Easter*. After *Hilary* and *Trinity* terms, the judges go their *circuits*, for the trial of causes, wherein issues have been previously joined; and hence they are called *issuable* terms.

In each of these terms, there are stated days, called *general* or *common* return days; of these there are *four* in each term, except *Easter*, which has five. In *Hilary* term, the general or common return days are, in eight days of Saint Hilary, in fifteen days of Saint Hilary, on the morrow of the Purification, and in eight days of the Purification. In *Easter* term, they are, in fifteen days of Easter, in three weeks after Easter, in one month after Easter, in five weeks from Easter-day, and on the morrow of the Ascension. In *Trinity* term, they are, on the morrow of the Holy Trinity, in eight days of the Holy Trinity, in fifteen days of the Holy Trinity, and in three weeks after the Holy Trinity. And in *Michaelmas* term, they are, on the morrow of All Souls, on the morrow of Saint Martin, in eight days of Saint Martin, and

in

in fifteen days of St. Martin². Some of these return days happen on a *Sunday*; and anciently, when writs were formed, courts of justice did actually sit on that day: but that practice having been long disused, it is now held, that an appearance cannot be entered, nor any judicial act done, or supposed to be done, by the court, till the *Monday*³.

On one or other of these return days, all *original* writs, and process thereon, must be made returnable, *ubicunque*, &c. or wheresoever the king shall then be in *England*⁴. The first general return day of the term is usually called the *essoin-day* of that term; and formerly, when essoins were allowed in personal actions, if the defendant did not appear, or cast an essoin on that day, the plaintiff on the next day might have entered an exception, and obtained an order that his essoin should not be received⁵; and from this exception, so taken and entered, the second day after the return of the writ was called the *day of exception*. The third day, the sheriff returned his writs into court, which were delivered to the *custos brevium*, and from thence this day was called the *day of retorna brevium*; and then it was that the court was seised of the cause,
by

² For a table of the *terms* and *returns*, see Append. Chap. 3 Bur. 1596. 1 Blac. Rep. 496. 526. S. C.

V. § 14.

³ Trye, 2.

⁴ Regist. 19. W. Jon. 156.

⁵ Gilb. C. P. 13.

² Salk. 627. 6 Mod. 250.

by possession of the writ. The fourth day was called the *appearance day*, or *dies amoris*^d, which was the day given *ex gratiâ curiæ*, for the defendant's appearance. And this, which is denominated the *quarto die post*, is now the first day in *full term*, on which the court sits for the dispatch of business, except in *Trinity term*, when the court, by act of parliament, does not sit till the *fifth day*; or except in *Michaelmas term*, when the morrow of All Souls falls on a *Sunday*, in which case they sit on the *third day*^e. The first and last days of every term are days of appearance.

The original writ should always be teste'd after the cause of action accrued^f; and there should be *fifteen days* at least between the *teste* and return of it^g; the law requiring that distance of time between the *service* and return: though if there be less, it will be aided by the defendants appearing and pleading in chief^h. In proceeding to outlawry, if the instructions be carried to the cursitor within the first week of a term, and the cause of action arose early enough, he will, for the sake of expedition, make the original returnable on the first or any other return of the preceding termⁱ: otherwise, it is usually made returnable in the *same* or the next term;

^d Co. Lit. 135. a.

9. 3 Blac. Com. 275.

^e *Ante*, 98, 9.

^h 1 Salk. 63. 1 Ld. Raym.

^f 2 Bur. 967.

671. S. C.

^g 2 Inst. 567. Booth on

ⁱ Trye, 60.

real Actions, 5. Gilb. C. P.

term; or, as it does not affect the liberty of the defendant, it may be made returnable at the distance of two or three terms ^k.

The *want* of an original writ is aided after verdict, by the 18 Eliz. c. 14. but not after judgment by default, or confession ^l; or upon demurrer, or *nil tiel record*. And it has been holden, that an original writ which is bad in substance, or a good one which warrants not the declaration, is not aided by this statute ^m. Where the original however differs from the declaration, and is now between the same parties ⁿ, in the same county ^o, of the same term ^p, or for the same cause of action ^q, the court on a writ of error will *primâ facie* intend that it is not the original upon which the action was brought; and where it is certified to be the same, if the defendant in error come in upon the *scire facias ad audiendum errores*, and allege for diminution that it was not the original upon which he declared, the court will grant a new *certiorari*; and if upon such writ, there appear to be a good original, the plaintiff

^k Dyer, 175.

from, is aided after verdict.

^l Stat. 4 Ann. c. 16. § 2.

ⁿ Cro. Eliz. 204. Hob.

^m 5 Co. 37. b. Cro. Eliz. 251.

722. Yelv. 108. Cro. Jac.

^o Cro. Jac. 654, 5. 674.

185. Cro. Car. 282. 1 Lev.

Palm. 428. 2 Rol. Rep. 382.

69. 1 Sid. 84. 2 Ld. Raym.

but see Cro. Jac. 479. *contra*.

1209.; but see the stat. 5

^p Cro. Car. 272. 327. 3

Geo. I. c. 13. by which *any*

Mod. 136.

defect or fault, either in form

^q 10 Mod. 318. 11 Mod.

or substance, in the original

382.

writ, or any variance there-

tiff in error will not be suffered to make any allegation to the contrary^r.

When all the proceedings are of the same term, an original writ of that term will warrant them^s; and the cursitor will make it out, as a matter of course, at any time before the essoin-day of the ensuing term. But an original writ of the term wherein final judgment is given, will not warrant the judgment, if it appear upon record, that there have been proceedings of a preceding term^t. And it is a rule in Chancery, that no cursitor shall make original writs of any return past, unless he receive instructions within the term wherein they are to be returnable, or at furthest on or before the essoin-day of the next succeeding term, without warrant from the lord chancellor, or master of the rolls^u.

If the defendant therefore bring a writ of error, after a judgment by default, &c. it is usual for the plaintiff to present a *petition* to the master of the rolls, setting forth the proceedings in the action, and the bringing of the writ of error, and that the petitioner hath not sued out an original writ to warrant the judgment, which he is advised is necessary; and that the time for applying for the same in ordinary course being expired, the cursitor cannot make it out, without an order for that purpose.

^r Cro. Jac. 597. Palm. ^t 1 Wils. 181.

428. 11 Mod. 382. and see ^u Lord Clarendon's orders in
Run. Ej. 142, 3. Chancery.

^s 1 Keb. 327.

pose^v. On this petition, the master of the rolls will grant his *fiat*^w; upon which an order^x is drawn up, agreeably to the prayer of the petition, that the cursitor of the county where the venue is laid, do issue out an original writ, with a proper return; and that the petitioner pay the plaintiff in error his costs, if he do not proceed further, after having had notice of the order.

An original writ was not *amendable* at common law, in the case of a common person^y. But it may be amended, by the statute 8 Hen. VI. c. 12. for the *misprision* of the clerk, in not following his instructions, or on account of his *nescience*, or want of skill, in matters of form, though not in substance^z. When the cursitor or his clerk has been guilty of a mistake, in making out the original variant from the *præcipe*, which is the warrant for the original, the practice of the office is to set it right, as a matter of course, and re-seal the writ^a: Or the amendment may be made on *motion*, or by *petition* to the master of the rolls^b; and it seems that before the return of the writ, the motion should be made in Chancery^c, but afterwards, in the court where the writ is returnable^d. The

^v Law and Prac. of *Error*, 29, 30. Append. Chap. V. § 15.

^w *Id.* § 16.

^x *Id.* § 17.

^y 8 Co. 156. b. 1 Salk. 49

^z Ld. Raym. 564. S. C.

^a 8 Co. 159. Gilb. C. P. 117. Barnes, 10. 16. 22.

^b 3 Atk. 599.

^c 2 Wils. 345. 6 T. R. 544. 7 T. R. 300.

^d 3 Atk. 596.

^e Barnes, 10. 16. 22.

The first *process*, or proceeding upon the original writ, in actions of *account*, *covenant*, *debt*, *annuity*, and *detinue*, is a *summons*^c, or warning to appear according to the exigency of the writ; being nothing more than a copy of the writ itself, made out by the plaintiff's attorney for the sheriff, and delivered by one of his officers to the defendant, or left at the usual place of his abode.

The defendant being summoned, was formerly allowed to cast an *essoin*^f, or send an excuse by his servant for not appearing; and that being done, it was the plaintiff's duty to adjourn it to some day, appointed by the court, in the next term^g; if he did not, he was liable to be *non-pros'd*. But no *essoin* was ever allowed in *personal* actions, on the return of a *capias*^h; nor even on a *summons*, where the defendant was seen in court, or appeared by attorneyⁱ: and as a corporation aggregate could not appear in any other manner, they were not entitled to an *essoin*^k. At this day, the defendant being in general at liberty to appear by attorney, no *essoin* is allowed in any *personal* action whatsoever, even where a peer or member of parliament is defendant^l. Where an *essoin* is cast, and neither quashed nor adjourned to a particular day, the

^c Finch, L. 305. 352.

ⁱ 2 Wils. 165.

^f 2 Inst. 125. b. 137.

^k Bro. Abr. tit. *Corporation*, 28. Cas. Pr. C. P. 8.

^g Cro. Eliz. 367. Gilb. C. P. 13.

^l 2 T. R. 16

^h 2 Str. 1194.

the plaintiff may declare the first day of the next term, and the defendant is not entitled to an imparlance ^m.

If the defendant appear on or before the *quarto die post* of the return of the original, he should cause an appearance to be entered with the *filazer*, who is so called from the *files* of the *custos brevium*, which are warrants for him to continue the process ⁿ. If he make default, and the sheriff return that he is summoned, the filazer issues an *attachment* ^o; which is a judicial writ, commanding the sheriff to put the defendant by gages and safe pledges; that is, to take certain of his goods, which are forfeited if he do not appear, or to make him find personal pledges or sureties, who shall be amerced in case of his non-appearance ^p: And this is the first and immediate proceeding upon the original in trespass *vi et armis* ^q, &c. where the violence of the wrong requires a more speedy remedy, and therefore the original writ commands the defendant to be at once attached, without any previous warning. Upon this process, it seems that the sheriff may either *summon* the defendant, or take gages for his appearance at the return of it ^r. But a sheriff's officer cannot justify entering

^m 2 T. R. 16.

Ej. 139. 3 Blac. Com. 280.

ⁿ Gilb. C. P. 14. Trye,

^o Finch, L. 355.

in pref.

^p Bro. Abr. tit. *Attachment*,

^q Append. Chap. V. § 7.

pl. 9. and see Dalt. Sher. ch.

^r Gilb. Distr. 18, &c. Run.

32. p. 154, &c.

entering the defendant's house, under an original writ of trespass *quare clausum fregit*, and continuing there, till the defendant paid him a sum of money, as and by way of surety for his appearance^s.

The sheriff's return to the attachment is either that he has attached the defendant^t, or that he has nothing by which he can be attached: in the latter case, the plaintiff may have a *testatum pone*, or attachment^u. If the defendant, being attached, still neglect to appear, the plaintiff may proceed to compel his appearance by *distringas*^v, or distress infinite; which is a process commanding the sheriff to distrain the defendant, by all his lands and chattels, and to answer for the *issues*^w, or profits of the same. On the first *distringas*, the sheriff usually returns issues to the amount of forty shillings; and if the defendant do not appear, before or on the *quarto die post* of the return, the plaintiff should sue out an *alias distringas*^x, and thereupon move the court to increase the issues; a proceeding that seems to have come in lieu of the writ of averment^y. In general, if the debt be small, the court will order issues to be returned at once to the amount of it: but otherwise, on the defendant's non-appearance, the plaintiff should
sue

^s 6 T. R. 137.

Westm. 2. c. 39. 2 Inst. 453

^t Append. Chap. V. § 3.

5 Mod. 117.

^u *Id.* § 9.

^x Append. Chap. V. § 11

^v *Id.* § 10.

^y *Thes. Brev.* 144. 5

^w Finch, L. 352. Stat.

sue out a *pluries*^a or *testatum*^a *distringas*, and move the court a second time, and so *toties quoties*, until issues be returned to the amount of the debt. When that is done, the plaintiff should apply to the court, for a rule for sale of the issues^b, under the statute 10 Geo. III. c. 50. which enacts, that “the court out of which the writ proceeds, may “order the issues, levied from time to time, to “be sold, and the money arising thereby to be “applied, to pay such costs to the plaintiff, as “the said court shall think just, under all the “circumstances, to order; and the surplus to be “retained, until the defendant shall have appeared, or other purpose of the writ be answered:” Which statute has been construed to extend to all writs of *distringas*, and not to be confined to such as concern privilege of parliament only^c. But if the defendant be called in the writ by a wrong name, the sheriff will not be justified in taking his goods under it^d. (*)

The method of proceeding by summons, attachment, and distress infinite, is not affected by the statutes for preventing frivolous and vexatious arrests^e; which only relate to process against the *person*. It may therefore still be
used

^a Append. Chap. V. § 11.

^d 6 T. R. 234.

^a *Id.* § 12.

^e 12 Geo. I. c. 29. 5 Geo.

^b *Id.* § 13.

II. c. 27. Barnes. 407, 8, 9.

^c 5 Bur. 2726, 7.

(*) From the *addenda* to the London edition. “If three partners (two of whom reside abroad and one in *England*) be sued for a partnership debt.

used to advantage, where the defendant has *property*, but cannot be arrested or served with process: And as no *capias* lies, it is the *only* method of proceeding against *peers* of the realm, *corporations*^f, and *hundredors* on the statutes of hue and cry^g, &c.

^f Com. Dig. tit. *Pleader*, § 3 Keb. 126.

2 B. 2. 6 Mod. 183.

debt, and the partner resident in *England* appear to the action, but refuse to appear for the partners resident abroad, the sheriff under a *distringas* issuing out of the court of common pleas against the two partners, may take partnership effects, though paid for by the partner resident in *England* alone, to whom the partnership was largely indebted; and the court will not relieve him from such distress.”
3 Bos. & Pul. 254.

CHAPTER VI.

Of the PROCEEDINGS in ACTIONS against PEERS of the REALM, and MEMBERS of the HOUSE of COMMONS; and against CORPORATIONS and HUNDREDORS.

AT common law it seems that *peers* of the realm, and *members* of the house of commons, not being subject to a *capias*, could only have been sued by *original writ*. But now, by statute 12 and 13 W. III. c. 3^a. “any person or persons, having cause of action against any knight, citizen, or burgess of the house of commons, or any other person entitled to privilege of parliament, may prosecute such knight, &c. in his majesty’s court of King’s Bench, Common Pleas, or Exchequer, by summons and distress infinite, or by original *writ* and summons, attachment and distress infinite; which the said respective courts are impowered to issue against them, or any of them, until he or they shall enter a common appearance, or file common bail, to the plaintiff’s action, according to the course of each respective court.”

Since

^a For the history of this statute, and the alterations it underwent in the house of lords, see 2 H. Blac. 273, 4. 300, &c.

Since the making of this statute, *members* of the house of commons may be sued by *bill* and summons, &c. as well as by *original writ*^b. And if a person having privilege of parliament be in the King's Bench prison, a declaration may be filed against him, as being in the custody of the marshal; and no summons need be issued^c. There are also two cases, in which it has been determined, that a *peer* of the realm may be sued by *bill* and summons^d, &c. But in a late case^e, it was the opinion of the judges, on a question referred to them in the house of lords, that these cases were not to be considered as decisive authorities on the subject; though after pleading in chief, it was too late for the defendant to object to the jurisdiction of the court^f. It seems therefore that, notwithstanding the above statute, the only regular mode of proceeding against a peer, is by original writ^g. Where an action is brought against

^b 2 Ld. Raym. 1442. 2 Str. 734. S. C. But this mode of proceeding is not allowed, as against unprivileged persons. *Whitworth v. Richardson*, E. 23 Geo. III.

^c 5 T. R. 361.

^d Say. Rep. 63, 4. Cowp. 844.

^e 2 H. Blac. 267. 299. and see 3 Bos. & Pul. 7. 9. (*b*). 12. (*c*).

^f See also Bro. Abr. tit.

Bill, pl. 6. and *Responder*, pl. 30.

^g 2 H. Blac. 267. 299. Lil. Ent. 21. The original writ and process against a peer or member of the house of commons, is the same as against other persons; for which *vide* Append. Chap. V. only that in the original writ against a peer, the sheriff must always be commanded to *summon* him by good summoners; and after

against a peer or member of the house of commons, jointly with other persons, the original writ or bill should be against all the defendants; upon which the peer or member should be summoned, and a *capias* issued against the other defendants.

In proceeding by *original* writ, against a peer or member of the house of commons, the original should issue into that county where the defendant lives; and a *summons*, which is nothing more than a copy of the original, is made out thereon by the plaintiff's attorney, and delivered to the sheriff, who serves it on the defendant¹. Before or on the *quarto die post* of the return of the original, the defendant either appears or makes default; for he cannot cast an *essoin*². If he make default, the plaintiff should sue out a *distringas*³, and after that (if necessary) an *alias* or *pluries distringas*; upon which he may move to increase and sell the issues, as before directed⁴. Or if the sheriff return upon the *distringas*, &c. that the defendant hath nothing by which he can be distrained, the plaintiff may have a *testatum distringas* into another county⁵. The

after describing the defendant in both cases by his proper title, these words must be added, "*having privilege of parliament;*" and instead of saying in the process, "*so that you have his body,*" say, "*so that he be, &c.*"

² 2 Crompt. 146. and it is

said, that a peer or peeress cannot be *attached*, but should be brought in by *summons*,

¹ Str. 228.

² *Ante*, 105.

³ Trye, 9.

⁴ *Ante*, 107, 8.

⁵ Trye, 10. 127

The *distringas* and other subsequent process upon the original, state the cause of action at largeⁿ; and must be made returnable on a general return-day *ubicunque*, or *wheresoever* the king shall then be in England. Each succeeding writ must be teste'd on the *quarto die post* of the return of the preceding one; and there must be *fifteen* days at least between the teste and return.

If the defendant appear upon any of these writs, he should enter his appearance with the filazer; and when the purpose of the writ is thus answered, the issues (if any have been levied,) are directed to be returned; or if sold, what shall remain of the money arising by such sale is to be repaid to the party distrained upon^o. But the plaintiff in such case is entitled to his costs: and where he had obtained rules for selling the issues levied upon a *distringas*, *alias*, and *pluries*, and also a rule for an attachment against the sheriff, but the defendant appeared *before any issues had been actually levied*, the court ordered, that upon payment of the costs of issuing the writs, the rules should be discharged; being of opinion, that these costs were not to abide the event of the suit, but were to be paid to the plaintiff immediately, and at all events, whether he should finally succeed in the suit or not^p.

The *bill* against a member of the house of commons,

ⁿ Trye, 127.

^p 5 Bur. 2725.

• Stat. 10 Geo. III. c. 50. § 4.

mons, is a complaint in writing, describing the defendant as *having privilege of parliament*^q; and concludes with a prayer by the plaintiff, of process to be made to him, according to the form of the statute, &c. This bill is filed on treble-penny stamped parchment, with the clerk of the declarations, in the King's Bench office: and the first process thereon is a writ of *summons*^r; which is a judicial writ, issuing out of the same office, on a proper *præcipe*^s, and directed to the sheriff of the county where the venue is laid, commanding him to summon the defendant. Or if the defendant reside in a different county, the plaintiff may sue out a writ of *testatum* summons into that county. Upon one or other of these writs the defendant should be summoned, in like manner as upon the original; and if he do not appear within four days after the return of it, is subject to the process of *attachment* and *distringas*^t, &c. If he appear, his appearance should be entered with the proper officer, in the King's Bench office.

The writ of summons, and other subsequent process upon the *bill*, differ from the process by *original*, in the following particulars; first, that they do not state the cause of action at large, but only require the defendant to answer the plaintiff, generally, *in a plea of trespass on the case, to his damage of, &c.* (according to the plea) *as he can reasonably shew that thereof he ought to answer*^u; secondly,

^q Say. Rep. 64. and see ^s *Id.* § 3. 5.

Append. Chap. VI. § 1, 2. ^t *Id.* § 6, 7, 8.

^r Imp. K. B. 427. 8 Mod. ^u 2 Crompt. 146. Trye. 228. and see Append. Chap. 127.

VI. § 4.

secondly, that they are teste'd on the very return, and not on the *quarto die post* of the return, of each other; thirdly, that they are made returnable on days *certain*, and not on *general* return-days; and fourthly, that there need not be fifteen days between the teste and return of them.

The defendant having appeared, the plaintiff proceeds to *declare* against him. The time allowed for declaring against a peer of the realm, or member of the house of commons, is the same as in other cases. But in assigning the breach in *assumpsit*, against a peer of the realm, the plaintiff must not charge the defendant with *contriving and fraudulently intending, craftily and subtilely to deceive and defraud him*; for the house of lords have adjudged it a very high contempt and misdemeanor, to charge a member of their house with any species of fraud or deceit ^v.

All further proceedings against peers of the realm, and members of the house of commons, are the same as against other persons ^w; only it should be remembered, that as no *capias* lies against them, they cannot be taken in execution, unless where the judgment is obtained upon a statute-staple, or statute-merchant, or upon the statute of *Acton Burnel* ^x, in which cases a *capias* lies, even against peers of the realm.

In

^v 2 Crompt. 149.

^x 11 Edw. I.

^w 8 Mod. 229.

In proceeding against a *corporation*, the process should be served on the mayor, or other head officer^y; and if the defendants do not appear, before or on the *quarto die post* of the return of the original, by an attorney appointed under their common seal, (for they cannot appear in person^z;) the next process is a *distringas*, which should go against them in their public capacity^a: and under this process, the sheriff may distrain the lands and goods, which constitute the common stock of the corporation^b. If they have neither lands nor goods, there is no way to compel them to appear, at law or in equity^c, but only in parliament^d: for it is a rule, that for a public concern, the sheriff cannot distrain any private person, who is a member of the corporation^e.

The principal statutes, by which *hundredors* are made answerable for damages, are first, the statutes of *Hue and Cry*, 13 Edw. I. st. 2. c. 1, 2. 28 Edw. III. c. 11. 27 Eliz. c. 13. 8 Geo. II. c. 16. and 22 Geo. II. c. 24.; secondly, the *Riot* act, 1 Geo. I. st. 2. c. 5.; and thirdly, the *Black* act, 9 Geo.

^y Sty. Rep. 367. Prec. in in Chan. 129. S. C.
Chan. 131. 1 Chan. Cas. ^d 1 Chan. Cas. 204.
206.

^z *Ante*, 63.

^a 1 Vent. 351.

^b Skin. 27.

^c *Id.* 1 Vern. 122. Skin. 83, 4. S. C.
84. S. C. 2 Vern. 395. Prec.

^e Bro. Abr. tit. *Trespas*,
135. 1 Vent. 351. Cowp.
85. Styles, 367. *contra*; and
see 1 Lev. 237. Finch Rep.

9 Geo. I. c. 22^f. In proceeding against *hundredors*, on the statutes of hue and cry, it seems that the process might have been formerly served on any inhabitant of the hundred. But now by statute^g,
 “ no process for *appearance*, in any action to be
 “ brought upon the statutes of hue and cry, or
 “ either of them, against any hundred, shall be
 “ served on any inhabitant thereof, save only upon
 “ the high-constable or high-constables of the
 “ hundred, wherein the robbery shall happen;
 “ who is and are required to cause public notice
 “ thereof to be given, in one of the principal
 “ market-towns within such hundred, on the next
 “ market-day after he or they shall be served with
 “ such process; or if there shall happen to be no
 “ market-town within the hundred, then in some
 “ parish church within the same hundred, imme-
 “ diately after divine service, on the Sunday next
 “ after

^f See also the statute 11 Geo. II. c. 22. and 36 Geo. III. c. 9. § 2. by which actions are given against the hundred, for damages sustained by unlawfully stopping or seizing any wheat, flour, meal, malt or other grain, in or on the way to or from any city, market-town or place in this kingdom; or by wilfully and maliciously breaking, cutting or destroying any wagon, cart or other carriage, wherein any such wheat, &c. shall be loaded, or the harness of any horse or horses

drawing or carrying the same; or by unlawfully taking off from any such carriage, or driving away, killing or wounding any such horse or horses; or by taking or carrying away, destroying, scattering abroad, spoiling or damaging such wheat, &c. or any part thereof. And see the statute 9 Geo. III. c. 29. and 41 Geo. III. c. 24. as to the demolishing or pulling down of mills, and the works thereunto belonging. 3 East, 457.

g 8 Geo. II. c. 16. § 4.

“ after his or their being served with such pro-
“ cess: and he or they is and are impowered and
“ required to enter, or cause to be entered, an
“ appearance in the said action, and also defend
“ the same, for and on behalf of the inhabitants
“ of the said hundred, as he or they shall be ad-
“ vised.”

“ And in case the plaintiff or plaintiffs in such
“ action shall recover and obtain judgment there-
“ in, then no process of *execution* shall be
“ served on any particular inhabitant or inhabi-
“ tants of the said hundred, or any franchise
“ within the precinct thereof, nor on the said
“ high-constable or high-constables; but the she-
“ riff or his officer shall, upon the receipt of any
“ writ or writs of execution to him directed, in
“ pursuance of the said judgment, instead of ser-
“ ving the said writ or writs on any inhabitant or
“ inhabitants, cause the same to be produced and
“ shewn *gratis* unto two justices of the peace, of
“ the county, riding, or division, (whereof one
“ to be of the *quorum*,) and residing within the
“ said hundred, or near unto the same; who shall
“ thereupon, with all convenient speed, cause such
“ taxation and assessment to be made, and to be
“ levied and collected, in such manner as is pre-
“ scribed in and by the statute made in the 27th
“ year of the reign of Queen *Elizabeth*; in which
“ taxation and assessment there shall be provided
“ for and included, over and above what the
“ costs

“ costs and damages recovered by the plaintiff or
 “ plaintiffs in such action shall amount to, all
 “ such just and necessary expences, as any high-
 “ constable or high-constables of any hundred
 “ hath or have been at, in having defended any
 “ such action as aforesaid, claim being made
 “ thereto, and an account thereof given in and
 “ proved in manner therein mentioned; and the
 “ sums of money so to be levied and collected,
 “ shall be paid over and delivered, by such officer
 “ or officers, as by the said statute of Queen
 “ *Elizabeth* are to levy and collect the same,
 “ within *ten* days after such collection, to the
 “ sheriff of the county wherein the robbery shall
 “ happen, to the use and behoof of the parties re-
 “ spectively entitled to receive the same.”

By the *riot* act^b, the action is to be brought
 against any *two* or more of the inhabitants of the
 hundred, in which the damage was done; and upon
 this act, it does not seem to be necessary to pro-
 ceed by original writ. But upon the *black* act^c,
 the action is to be brought against the inhabitants
 of the hundred, in like manner as upon the sta-
 tutes of hue and cry. And the *execution* upon
 these acts is regulated by the statute 22 Geo. II.
 c. 46. § 34. by which it is enacted, that “ no
 “ writ of execution, to be sued out against the
 “ inhabitants

^a 1 Geo. I. st. 2. c. 5. § 6.

^b 3 Geo. I. c. 22.

“ inhabitants of any hundred, on any judgment:
“ obtained by virtue of any act or acts of par-
“ liament whatsoever, shall be levied on any par-
“ ticular inhabitant or inhabitants of such hun-
“ dred; but the sheriff or sheriffs shall, on re-
“ ceipt of every such writ, cause the same to be
“ produced to two justices of the peace, in such
“ manner as is directed by the before-mentioned
“ statute of 8 Geo. II.; and that thereupon the
“ said justices shall, in the manner directed by
“ the said act, cause a taxation to be made, le-
“ vied, and collected, for raising and paying, as
“ well the costs and damages recovered by the
“ plaintiff or plaintiffs, as also all such just and
“ necessary expences, as any inhabitant or inha-
“ bitants of such hundred shall have been at, in
“ defending any such action, the same being first
“ proved on oath, and the attorney’s bill being
“ first taxed, in such manner as the said act directs;
“ and the sums of money so to be levied and col-
“ lected shall, within the time by the said act
“ limited, be paid to the sheriff or sheriffs, and
“ by him or them paid or delivered over to the
“ persons entitled to receive the same, without
“ any deduction, fee or reward.”

It seems that under this act, a writ of execution sued out by the party, who has recovered damages upon the *riot* act, and delivered by the sheriff to the justices, is a good foundation for an order to levy
the

the amount^k. But it has been determined, that the order of justices in such case, directing the money when levied to be paid into the hands of a banker, subject to their further order, is bad. It seems also, that the order for levying the money ought to be upon the inhabitants of the *towns, parishes, villages, and hamlets*, pursuant to the statute of 27 *Eliz.* and not upon the inhabitants of the *districts* and parishes within the hundred.

^k 5 T. R. 341.

CHAPTER VII.

Of the CAPIAS by ORIGINAL; and PROCESS of OUTLAWRY.

AT common law, the defendant was not liable to be arrested, for civil injuries unaccompanied with force^a. This immunity of the defendant's person, in case of peaceable though fraudulent injuries, producing great contempt of the law, in indigent wrong-doers, a *capias* was allowed to arrest the person, in actions of *account*, though no breach of the peace were suggested, by the statutes of *Marlbridge*, (52 Hen. III.) c. 23. and *Westm.* 2. (13 Ed. I.) c. 11. in actions of *debt* and *detinue*, by statute 25 Edw. III. c. 17. and in all actions on the *case*, by statute 19 Hen. VII. c. 9^b.

In ordinary cases therefore, if the sheriff return on the original writ, or process of attachment, that the defendant has nothing by which he can be summoned or attached, a *capias* may be sued out, in order to arrest his person^c. And where a *capias* lies, it is now generally issued in the first instance, without previously suing out the original^d; in like manner

^a 3 Co. 12.² W. 2 Gilb. C. P. 14.^b 3 Blac. Com. 281.

Blac. Com. 279, &c.

^c Com. Dig. tit. *Pleader*,^d *Ante*, 97.

manner as in Chancery, it was usual to issue the *subpœna*, without first bringing in the bill^e. The *capias* is a judicial writ, issued by the filazer, and directed to the sheriff or sheriffs of the same county as the original; commanding them to take the defendant, if he be found in their bailiwick, and safely keep him, so that they may have his body in court, at the return of the writ, to answer the plaintiff in the action: and it is usually called a special *capias ad respondendum*^f. If the sheriffs return to this writ, that the defendant is not found in their bailiwick, the plaintiff may have an *alias*, or *pluries capias*, directed to the same sheriffs, commanding them, as *before*, or as *oftentimes* they have been commanded, to take the defendant^g, &c.: or he may have a *testatum capias*, directed to the sheriffs of a different county, (and afterwards, if necessary, an *alias* or *pluries testatum capias*,) suggesting that the defendant lurks and wanders in that county^h. In any of these writs, if the defendant be within a liberty, it is usual to insert a clause of *non omittas*ⁱ. So that, under particular circumstances, it may be necessary for the plaintiff to have recourse to an *alias* or *pluries testatum, non omittas, capias ad respondendum*, which is the most special writ of any, against the defendant's person; and commands the sheriffs, as *before*, or as *oftentimes* they have been

^e Trye, 59.^h *Id.* § 4.^f Append. Chap. VII. § 1.ⁱ *Id.* § 5.^g *Id.* § 3.

been commanded, not to *omit* by reason of any liberty, but to *take* the defendant, &c. it being *testified* that he lurks and wanders in their county.

The process upon the original should be *teste'd* in the name of the chief-justice, or senior judge of the court, if there be no chief-justice. The *capias* should regularly be *teste'd* in term-time, on the *quarto die post* of the return of the original^k; but not on a Sunday, or other *dies non juridicus*^l; and each succeeding writ should be *teste'd* on the *quarto die post* of the return of the preceding one. But unless the plaintiff mean to proceed to outlawry, the *capias* may be *teste'd* before the original, and even before the cause of action accrued, provided it be actually taken out afterwards: for as the *capias* never appears on the record, no error can be assigned thereon^m; and the defendant cannot haveoyer of the *capias*, so as to plead it in abatementⁿ. These several writs must be made returnable, like the original, on a general return-day in term-time, *ubicunque*, or *wheresoever* the king shall then be in England; and there must be at least *fifteen* days between the teste and return^o. They must be returnable however in the same, or the next term; for where a whole term intervenes, between the

^k But see Trye, 59. 184, & Pul. 342, 3.

&c. *semb, contra*.

^o Trye, 60. 2 Wils. 117.

^l Trye, 191.

but see 3 Wils. 454. 2 Blac.

^m 3 Wils. 434.

Rep. 918. S. C. 1 Bos. &

ⁿ *Per Cur.* E. 18 Geo. III. Pul. 342.

² Crompt. 42. and see 1 Bos.

the teste and return of a *capias*, it is null and void^p. The process by *original* is amendable, as well as the process by *bill*^q: and leave has been given to amend a special *capias*, in one of the defendant's names, in order that an application might be made to the master of the rolls, to procure a new *original*^r.

Where the defendant is abroad, or keeps out of the way, so that he cannot be arrested or served with process, the plaintiff, on the return of *non est inventus* to the *pluries capias*, may have a writ of *exigi facias*, and proceed to *outlawry*^s: or if there be several defendants in a joint action, and one of them be abroad, or keep out of the way, the plaintiff may have a writ of *exigi facias* against that defendant^t; and must proceed to outlawry against him, before he can go on against the others^u.

Outlawry, in civil actions, is putting a man out of the protection of the law, so that he is incapable of suing for the redress of injuries, and may be imprisoned: and he forfeits thereby all his goods and chattels, and the profits of his lands; his *personal* chattels *immediately* upon the outlawry, and his
chattels

^p 2 Blac. Rep. 846.

^q *Ante*, 91.

^r 7 T. R. 299. and see 3

Wils. 454. 2 Blac. Rep. 918.

S. C. 1 H. Blac. 291. 1 Bos.

& Pul. 342. 481. 2 Bos. &

Pul. 109.

^s 3 Blac. Com. 283. Gilb.

C. P. 15.

^t Trye, 155.

^u 1 Str. 473. 1 Wils. 78.

2 Str. 1269. 1 Blac. Rep. 20

S. C.

chattels *real*, and the profits of his lands, when found by inquisition^v. So penal were the consequences of an outlawry, that until some time after the conquest, no man could have been outlawed except for felony, the punishment whereof was death: But in *Bracton's* time^w, and somewhat earlier, process of outlawry was ordained to lie in all actions *vi et armis*; and since, by a variety of statutes, (the same as introduced the *capias*,) process of outlawry lies in *account*, *debt*, *detinue*, and divers other common or civil actions^x.

If the defendant be a woman, the proceeding is called a *waiver*; for as women were not sworn to the law, by taking the oath of allegiance in the leet, (as men anciently were, when of the age of twelve years or upwards,) they could not properly be *outlawed*, or put out of the law, but were said to be *waived*, that is, *derelictæ*, left out, or not regarded^y. And for the same reason, an *infant* cannot be outlawed, under the age of *twelve* years^z.

Outlawry is either upon *mesne* process before, or upon *final* process after judgment^a. Upon *mesne* process, the plaintiff cannot proceed to outlawry, unless the action be commenced by *original writ*^b;
nor

^v 1 Salk. 395.

b. Trye, 66.

^w Bract. lib. v. p. 425.

^z Co. Lit. 128. a.

^x Co. Lit. 128. b. Trye,

^a Trye, 77.

72. Gilb. C. P. 15. Fort. 37.

^b 1 Sid. 159.

^y Lit. § 186. Co. Lit. 122.

nor can the defendant be outlawed after judgment, unless the action were so commenced: therefore, where the defendant was outlawed after judgment, in an action commenced by *bill* of privilege, it was holden that process of outlawry did not lie, as there was no *capias* in the original action^c. After judgment, the plaintiff may have an *exigi facias*, and proceed to outlawry, upon a *capias ad satisfaciendum*, without an *alias* or *pluries*^d; because the defendant, having been already in court before judgment, and having consance of the debt, ought to pay it on the first suing out of the *capias*, and his not performing the judgment is a contumacy, for which he is put out of the king's protection. And no writ of *proclamation* is required upon an *exigent* after judgment, but only upon mesne process^e.

The writ of *exigi facias* is a judicial writ, made out by the *filazer*, as clerk of the *exigents*^f, and directed to the sheriff of the county where the action is laid^g, commanding him to cause the defendant to be *required* from county court to county court, or from *husting* to *husting*, if in *London*^h, that is, at
five

^c 1 Leon. 329. Cro. Eliz. C. P. 15. Crompt. *introd.* 216. 100. *semb. contra.*

^d Gilb. C. P. 17. Trye, 77. 134.

^e Cro. Jac. 577.

^f Trye, *in pref.*

^g Fitz. Abr. tit. *Exigent*, 26. Bro. Abr. tit. *Exigent & Capias*, 19. Dyer, 295. But see 3 Bac. Abr. 769. Gilb.

^h In *London*, the hustings are holden once every fortnight; on which account the action is generally laid there, when the plaintiff intends to proceed to outlawry. Trye, 66. 3 Lev. 245.

five *successive*ⁱ county courts or hustings, until he be outlawed, if he do not appear, and if he appear, to take him^k, &c. This writ should be teste'd on the *quarto die post* of the return of the *pluries capias* before, or of the *capias* after judgment; and if there be not five county courts between the teste and return of it, there issues, upon the sheriff's return thereto^l, an exigent *de novo*, with a clause (from whence it is called an *allocatur* exigent) directing the sheriff to *allow* the several county courts, at which the defendant has been already required^m.

In addition to the exigent, a writ of *proclamation*ⁿ was introduced by the statute 6 Hen. VIII. c. 4. which requires it to be directed to the sheriff of the county of which the defendant is called, or described in the original; for there he was supposed to dwell; and if he did not in fact dwell there, he might have avoided the outlawry, by the statute of additions^o. But the writ of proclamation is at present governed by the statute 31 Eliz. c. 3. § 1. which enacts, that “in every action personal, “wherein any writ of *exigent* shall be awarded out “of any court, a writ of *proclamation* shall be “awarded and made out of the same court, having “day of teste and return as the said writ of *exigent* “shall

ⁱ Plowd. 371.

^k Trye, 112. and see Append. Chap. VII. § 6.

^l *Id.* § 7.

^m Trye, 114. Rast. Ent. 189. 355. and see Append.

Chap. VII. § 8.

ⁿ Gillb. C. P. 19. Trye, 113. *Thes. Brev.* 88. and see Append. Chap. VII. § 9.

^o Dyer, 214.

“ shall have, directed and delivered of record to
“ the sheriff of the county where the defendant at
“ the time of the exigent so awarded shall be dwell-
“ ing; which writ of proclamation shall contain
“ the effect of the same action: And that the sheriff
“ of the county, unto whom any such writ of pro-
“ clamation shall be delivered, shall make three
“ proclamations, *one* in the open county court,
“ *another* at the general quarter-sessions of the
“ peace, in those parts where the defendant at the
“ time of the exigent awarded shall be dwelling,
“ and the *third*, one month at the least before the
“ *quinto exactus* by virtue of the said writ of *exigent*,
“ at or near the most usual door of the church or
“ chapel of that town or parish, where the defend-
“ ant shall be so dwelling; and if the defendant
“ shall be dwelling *out* of any parish, then in such
“ place as aforesaid, of the next adjoining parish
“ in the same county, and upon a Sunday, imme-
“ diately after divine service, and sermon (if there
“ be one), and if there be no sermon, then forth-
“ with after divine service: And that all outlawries
“ had and pronounced, whereupon no writs of
“ proclamation shall be awarded and returned ac-
“ cording to the form of this statute, shall be ut-
“ terly void and of none effect.” This writ should
have the same *teste* and return as the *exigent*; and
if the defendant reside in a different county from
that into which the *exigent* issued, the writ is called
a *foreign*

a *foreign* proclamation^p. The sheriff's return to this writ is, that he has caused the defendant to be proclaimed; and that either generally, according to the effect of the statute^q, or specially, setting forth the times and places, when and where the proclamations were made^r.

Upon the defendant's being put in *exigent*, he is either taken by the sheriff, appears voluntarily, or makes default. If he be taken, he either remains in custody of the sheriff, or gives bail, &c. as upon a common arrest. Formerly, if the defendant had appeared voluntarily, at any time before the return of the *exigent*^s, he might have obtained a writ of *supersedeas*^t from the *filazer*, as clerk of the *supersedeas*'s^u, on entering a *common* appearance of the term in which the *exigent* issued^v; and he may still do so, where the action does not require *special* bail. But upon a question agitated some years ago, whether in a case originally requiring *special* bail, if the defendant stand out to an *exigent*^w, he can come in and appear to the *exigent*, without putting in special bail; it was ruled by the court,

^p Append. Chap. VII. § 10.

^q *Id.* § 11.

^r *Id.* § 12.

^s Cas. Pr. C. P. 28.

^t Append. Chap. VII. § 13.
and for the sheriff's return thereto, see § 14.

^u Trye, *in pref.*

^v *Id.* 67, 68. Gilb. C. P. 19. Fort. 39.

^w The question, as stated by Sir James Burrow, was whether the defendant, standing out to an *outlawry*, can come in and appear to the *outlawry*, without putting in special bail: But upon inquiry, it appears to have been as stated above, upon the *exigent* before *outlawry*.

court, that there ought to be special bail. "It would be very unreasonable, they said, that the defendant should gain an advantage, by standing out till process of outlawry: He certainly ought not to be in a better condition then, than if he had appeared at first." And accordingly the direction given was, that the filazer should not issue a *supersedeas*, till the defendant had put in special bail^x.

If the defendant be neither arrested nor appear, but make default, at five successive county courts, or hustings, he is *outlawed* if a man, or if a woman she is *waived*, by the judgment of the *coroners*, or of the *recorder* in *London*^y: and the judgment of outlawry being returned by the sheriff upon the *exigent*, the *filazer*, as clerk of the *outlawries*^z, will make out a writ of *capias utlagatum*, which is either *general* or *special*^a, and may be issued into any county, without a *testatum*^b; nor is there any occasion, upon an outlawry *after* judgment, to revive the judgment by *scire facias*, after a year and a day^c.

By the *general* writ of *capias utlagatum*, the sheriff is commanded, "that he do not omit, by reason
 " of any liberty of his county, but that he take the
 " defendant, if he be found in his bailiwick, and
 " him

^x 3 Bur. 1920.

^a *Id.* 65, 6. Gilb. C. P. 16.

^y Co. Lit. 288. b. Gilb.

^b 1 Vent. 33. Gilb. C. P.

C. P. 15, 16. and see Ap- 17.

pend. Chap. VII. § 7.

^c Cro. Eliz. 706. 5 Mod.

^z Trye, in *pref.*

203. Gilb. C. P. 71.

“ him safely keep, so that he may have his body
 “ in court, on a *general* return-day, *wheresoever*,
 “ &c. to do and receive what the court shall consider
 “ of him^d.” The defendant being taken by the
 sheriff on this writ, either gives bail to appear and
 reverse the outlaw; or remains in custody, until
 he actually reverse it, or obtain a charter of pardon,
 or be relieved under an insolvent act^e.

At common law, the defendant could not have
 been bailed, when taken by the sheriff, on a *capias*
utlagatum^f: and this case is particularly excepted
 out of the statutes 23 Hen. VI. c. 9. and 13 Car.
 II. stat. 2. c. 2. § 4.; by the latter of which sta-
 tutes, it is expressly declared, that “ no sheriff,
 “ &c. shall discharge any person or persons, taken
 “ upon any writ of *capias utlagatum*, out of custody,
 “ without a lawful *supersedeas* first had and received
 “ for the same.” But now by statute 4 and 5 W.
 & M. c. 18. § 4, 5. “ if any person outlawed in
 “ the court of King’s Bench, other than for trea-
 “ son and felony, shall be taken and arrested,
 “ upon any *capias utlagatum* out of the said court,
 “ the sheriff making the arrest may, *in all cases*
 “ *where special bail is not required by the said court*,
 “ take an attorney’s engagement under his hand,
 “ to appear for the defendant, and reverse the
 “ outlawry; and may thereupon discharge the de-
 fendant

^d Trye, 115. and see Ap-
 pend. Chap. VII. § 15, 16.

^f Trye, 73. 3 Bur. 1484
 4 Bur. 2540.

^e 4 Bur. 2119. 2127.

“ defendant from such arrest: and, *in those cases*
“ *where special bail is required by the said court*, the
“ said sheriff shall and may take security of the
“ defendant by bond, with one or more sufficient
“ surety or sureties, in the penalty of double the
“ sum for which special bail is required, and no
“ more, for his appearance by attorney in court,
“ at the return of the writ, and to do and perform
“ such things as shall be required by the said
“ court; and after such bond taken, may dis-
“ charge the defendant from the said arrest: Or,
“ in case the defendant shall not be able to give
“ security as aforesaid, *before the return of the writ*,
“ he shall and may be discharged, whenever he
“ shall find sufficient security to the sheriff, for
“ his appearance by attorney in the said court, at
“ some return in the ensuing term, to reverse the
“ outlawry, and to do and perform such other
“ thing and things, as shall be required by the
“ said court.” This statute has been construed
not to extend to *criminal* cases; at least, not to
misdemeanors, after conviction^g. And even in
civil cases, the defendant cannot be bailed, where
he was notailable upon the process to outlawry^h;
for it was the design of the statute to put him in the
same condition, as if he had not been outlawed: and
therefore, he is notailable, when taken upon an
outlawry *after* judgment. Neither, upon this sta-
tute,

^g 4 Bur. 2539.

^h *Id.* 2540.

tute, will the court restore goods, taken upon a special *capias utlagatum*ⁱ, but they will of course be restored, upon the reversal of the outlawry^k.

Where there is no affidavit of aailable cause of action, the sheriff is authorised, by the statute, to discharge the defendant, on an attorney's undertaking to appear and reverse the outlawry. But where an affidavit has been made, he ought not to be discharged, without giving the security required by the statute; which is not a *common* bail-bond, but a bond, with one or more sufficient surety or sureties, for appearance by attorney, at the return of the writ, *and to do and perform such things as shall be required by the court*^l; that is, to put in bail to a new action, plead within a limited time, put the plaintiff in the same condition, and such like matters^m. And it is not necessary that the affidavit should be made *before* the outlawryⁿ, or the sum sworn to indorsed on the *capias utlagatum*^o; but it is sufficient, if there be an affidavit before the defendant is discharged: the court having determined, that process of outlawry is not within the statutes for preventing frivolous and vexatious arrests^p.

By

ⁱ *Per Cur.* M. 20 Geo. III. 3. S. C. Fort. 39. S. P.

^k Carth. 459. 1 Ld. Raym. ^o 3 Bur. 1482.

349. S. C. *Post*, 143.

^p *Fownes* against *Allen*, M.

^l 3 Bur. 1483.

10 Geo. II. cited in 3 Bur

^m 4 Bur. 2540.

1483. Barnes, 322.

ⁿ 2 Str. 1178, 9. 1 Wils.

By the *special writ* of *capias utlagatum*, the sheriff is commanded, not only to take the defendant, as by the *general writ*, but also “to inquire, by
 “the oath of honest and lawful men of his county, what goods and chattels, lands and tenements, he hath, or had on the day of his outlawry, or at any time afterwards; and by their
 “oath to extend and appraise the same, according to their true value; and to take them into the
 “king’s hands, and safely keep them, so that he may answer to the king for the true value and
 “issues of the same; making known what he shall do thereupon to the court, on the return-day^a.”
 Upon this writ, the sheriff is to impanel a jury, who are to make inquiry of the *goods* and *chattels* of the defendant, including his *debts*^r or *choses* in action, and also of his *leasehold* and *freehold* lands and tenements; to *appraise* the goods, and to *extend* or value the lands, &c. But they have nothing to do with his *copyholds*^s, or *trust* property^t. Witnesses may be *subpœna’d* to attend the execution of the inquiry; and when made, the sheriff is to take possession of the goods and chattels of the defendant, and of the *leasehold* tenements in
 his

^a Trye, 115, 16. *Off. Brev.* P. 200.

^r 35. *Theas. Brev.* 59, &c. *Lil.* ^s Parker, 190.

Ent. 552. and see *Append.* ^t *Cro. Jac.* 513. *Sty. Rep.* Chap. VII. § 17. 41. But see the statute of

^r 4 *Co.* 95. *Lane*, 23. *frauds*, 29 *Car. II.* c. 3. § 10

Lutw. 329. 1513. *Gilb.* C

his own occupation^u: But he must not oust or disturb the possession of his tenants^v: and can only take the *issues* or profits of his *freehold* tenements^w. The inquisition should set forth, with *convenient certainty*, the appraised value of the *goods*; the particulars of the *debts*; of what *lands*, &c. the defendant is seised or possessed, the different *parcels*, in whose *tenure*, and of what annual *value*, beyond reprises^x: But the inquisition, being merely an office of *instruction* or *information*, does not require so much *certainty* as an office of *entitling*^y. And if the lands, &c. be *undervalued*, there may be a *melius inquirendum*^z.

When the *special writ* of *capias utlagatum* is returned, it should be delivered, with the inquisition annexed, to the *filazer*, as clerk of the *exigents* and *outlawries*^a, and afterwards filed in the office of the *custos brevium*^b; from whence a *transcript* is sent into the exchequer^c. Out of this court there issues a *venditioni exponas* to sell the *goods*^d, a *scire facias* to recover the *debts*^e, and a *levari facias* to levy the *issues* and profits; under which latter writ, the sheriff may take not only the
rent

^u 9 Hen. VI. 20, 21.

^v *Id.* 21 Hen. VII. 7.

^w *Id.* Plowd. 541. Hardr. 106. 176. Bunb. 103. 105.

^x Append. Chap. VII. § 18, 19.

^y 2 Salk. 469. Bunb. 103.

^z Hardr. 106.

^a Trye, *in pref.*

^b *Id.* 88, 9. 3 T. R. 578, 9.

^c Gilb. C. P. 16.

^d Append. Chap. VII. § 20. and for the return thereto, see § 21.

^e Gilb. C. P. 16. 1 Lutw. 330.

rent and moveables of the party outlawed, but also the cattle of a *stranger, levant and couchant* on the lands extended^f. In aid of these writs, a *bill* may be exhibited in the exchequer against the outlaw, to compel a discovery of his real and personal estate, &c. either by the plaintiff, to enable him to take out execution, or by the attorney-general, on behalf of the crown^g. And it is said to be the course of that court, upon an outlawry, to prefer an *information*, in the nature of a trover and conversion, against him that hath the goods of the party outlawed^h.

The money raised by the sheriff, under these writs, belongs to the crown; but the plaintiff may have it paid to him, in satisfaction of his debt and costs, by applying to the court of exchequer, or lords of the treasury: and he may also, upon *petition*ⁱ to the lords of the treasury, obtain a *lease* of the lands, &c. under the exchequer seal^k, or a *grant* of the king's right to levy the profits^l. If the money raised by the sheriff do not exceed the sum of fifty pounds, the court of exchequer, on *motion*, will order it to be paid to the plaintiff: But if it exceed that sum, the plaintiff must *petition* for it,
to

^f 1 Ld. Raym. 305. and the cases there cited, in the last edition.

^g Hardr. 22.

^h 1 Mod. 90.

ⁱ Append. Chap. VII. § 22.

^k Hardr. 106. 422. T. Raym. 17. 1 Lev. 33. S. C.

^l 9 Hen. VI. 20. 2 Rol. Abr. 808. Gilb. C. P. 17.

to the lords of the treasury; stating the amount of his debt, a short abstract of the proceedings, with the expences he has been put to, and praying, in respect thereof, that the attorney-general may be authorised to consent, on behalf of the crown, that the money, remaining in the sheriff's hands, may be paid over to the petitioner^m. This petition is referred, by the lords of the treasury, to their solicitorⁿ; who should be furnished with a *certificate* of the proceedings from the clerk in court^o, and an *affidavit*^p, sworn before a baron, of the amount of the debt and costs: whereupon he will make his *report*^q, which should be filed with the clerk of the treasury. A *warrant* is then issued, under the king's sign-manual, for the attorney-general to give his consent to an order, pursuant to the prayer of the petition^r: upon which a *motion* is made in the court of exchequer; and the attorney-general consenting, an *order* is framed accordingly^s. This order must be engrossed, and put under seal, with a *subpœna*^t annexed to perform it; and the sheriff, being served therewith, must pay over the money, or will be liable to an attachment^u.

Having thus shewn the consequences of an outlawry,

^m Append. Chap. VII. § 23.

ⁿ *Id.* § 24.

^o *Id.* § 25.

^p *Id.* § 26.

^q *Id.* § 27.

^r *Id.* § 28.

^s *Id.* § 29.

^t *Id.* § 30.

^u Imp. K: B. 448. 2 Crompt. 47.

lawry, I shall proceed to consider the mode of *reversing* it, where the party outlawed comes in *gratis*, or in consequence of an arrest upon the *capias utlagatum*. There are two ways of reversing an outlawry, 1st, by *writ of error*^v, returnable *coram nobis*^w; 2dly, by *motion*, founded on a plea, averment^x or suggestion, of some matter apparent, as in respect of a *supersedeas*, omission of process, variance, or other matter apparent on the record: and yet, in these cases, some have holden, that in another term the defendant is driven to his writ of error. But for any matter of fact, as death, imprisonment, beyond sea at the time of the *exigent* awarded^y, service of the king, &c. he is driven to his writ of error, unless it be in the case of felony, and there *in favorem vitæ* he may plead it. It seems, however, to be discretionary in the court to relieve by motion, or put the parties to a writ of error; and of late years they have gone further than heretofore upon motion, the more effectually to expedite justice, save expence, and preserve the credit and character of the defendant.

At common law, the party outlawed must have appeared *in person*, in order to reverse the outlawry ;
and

^v Co. Lit. 259. b. Trye, 60. and see Append. Chap. 73. Fort. 38. Append. Chap. VII. § 33.

VII. § 31. and for the assignment of errors, see § 32. ^y Carth. 459. 1 Ld. Raym. 349. S. C. 2 Str. 1178. 1

^w Trye, 74. Wils. 3. S. C.

^x *Id.* 69. 118. *Thes. Brev.*

and could not have appeared by *attorney*^z. But now, by statute 4 and 5 W. & M. c. 18. § 3. for the more speedy and easy reversing of outlawries, in the court of King's Bench, "No person outlawed therein, for any cause, matter or thing whatsoever, treason and felony only excepted, shall be compelled to come or appear in *person* in the said court, to reverse such outlawry, but shall or may appear by *attorney*, and reverse the same without bail, in all cases except where *special* bail shall be ordered by the said court."

Before the allowance of a writ of error, or reversing an outlawry, by plea or otherwise, *for want of proclamations*, the statute of *Elizabeth*^a requires, "that the defendant in the original action shall put in bail, not only to appear and answer the plaintiff, in a new action to be commenced for the cause mentioned in the former^b, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of *two terms* next after allowing the writ of error, or otherwise avoiding the said outlawry." On reversing the outlawry, for any *other* error in law besides the want of proclamations, it was long unsettled, whether the defendant should be obliged to put in *special* bail. In the

^z Cro. Jac. 462. Trye, by the outlawry; and consequently the plaintiff cannot

^a 31 Eliz. c. 3. § 3. 2 Salk. 496. declare upon it, but must bring a new action. Cro.

^b The reason seems to be, Eliz. 707. but see March, 9 that the process is determined

the earliest cases upon the subject, it was determined that he should^c: But there are cases to the contrary, in the time of *Holt*, Ch. J.^d; and in one of them^e it is said, that if the party outlawed come in *gratis*, upon the return of the *exigent*, &c. he may be admitted by motion to reverse the outlawry, for any other cause than want of proclamations, without putting in bail; but if he come in by *cepi corpus*, he shall not be admitted to reverse it without appearing in person, as in such case he was obliged to do at common law, or putting in bail with the sheriff for his appearance upon the return of *cepi corpus*, and for doing what the court shall order. In two subsequent cases^f, however, special bail was put in, upon reversing the outlawry, for errors in law, though it does not appear the party came in *gratis*. At length, in the case of *Serecold v. Hampson*^g, the court, upon considering the words of the 4 and 5 W. & M. c. 18. § 3. which empowers the outlaw to appear by attorney, and says, “the outlawry shall be reversed without bail, in all cases except where special bail shall be ordered by the court,” declared they were of opinion, they had a *discretionary* power to require it or not; and

^c Lit. Rep. 301. Carth. 459. 1 Ld. Raym. 349. S. C. Gilb. C. P. 19. ^d 12 Mod. 545. 1 Ld. Raym. 605. S. C. 2 Salk. 496. ^e *Wall & Wotton*, E. 12 G. I. cited in 1 Wils. 4. *Martin & Duckett*, 2 Str. 951. 2 Barnard. K. B. 298. S. C. ^f 2 Str. 1178, 9. 1 Wils. 3. S. C.

^g 2 Salk. 496.

and that the want of an affidavit *before* the outlawry was no objection^h, because that is only requisite to warrant an arrest: and though the 31 *Eliz.* c. 3. § 3. be the only act that expressly requires bail, it is not to be inferred from thence, that in other cases it ought not to be insisted on; for that act makes a new error, and the bail upon it is absolutely to pay the condemnation-money. And accordingly, it is now settled, that on reversing an outlawry, for any other error in law besides the want of proclamations, the bail is *common* or *special*, in like manner as upon the arrest. Where *special* bail is required, it need not be put in before the allowance of the writ of error; but it is well enough, if put in at any time before the reversalⁱ. The recognisance, in such case, is taken in the form prescribed by the statute of *Eliz.*^k; and the bail are answerable at all events for the condemnation-money.

In general, an outlawry can only be reversed upon payment of *costs*: But if the process have been abused, and made subservient to purposes of oppression, as where a man has been outlawed, who was already in prison at the plaintiff's suit^l, or being at large did not abscond, but appeared publicly, and might have been arrested or served with process,

^h *Ante*, 134.

ⁱ 1 *Ld. Raym.* 605. 2 *Str.* 951. 2 *Barnard.* 298. *S. C.*

^k 12 *Mod.* 545. *per Holt.* 2 *Salk.* 496. *Phillips v. War-*

burton, M. 26 G. III. *Borwick v. Parkins*, E. 31 G. III. *Imp. K. B.* 5 *Edit.* 520.
^l 2 *Vent.* 46. 2 *Salk.* 495. *Barnes*, 321.

cess^m, the court, on motion, will order the plaintiff to reverse the outlawry at his own expence.

When the outlawry is reversed, or the defendant has obtained a charter of pardon, he may be discharged, if in custody, by writ of *supersedeas*ⁿ; and his property^o, if taken into the king's hands, shall be restored to him, by writ of *amoveas manus*, or otherwise, according to the course of the exchequer^p. And where a sheriff's officer, being in possession of the tenant's effects under an outlawry, made a distress for rent, and sold the goods so distrained, and afterwards the outlawry was reversed; it was ruled, that the officer was liable to pay the produce of the goods to the landlord, in an action for money had and received^q. Where the defendant has obtained a charter of pardon, he must sue out a *scire facias*, to give notice thereof to the plaintiff, in order that he may further prosecute his action, if he think proper^r.

^m T. Jon. 211. Comb. 19. *personal*, see 5 Mod. 61.
12 Mod. 413.

^p Trye, 90. and see Append. Chap. VII. § 36.

ⁿ 13 Car. II. stat. 2. c. 2.
§ 4. Trye, 122. and see Append. Chap. VII. § 34, 5.

^q 7 T. R. 259.

^r Trye, 134. 154. and for the forms of the writ, and of the return thereto, see Append. Chap. VII. § 37, 8, 9.

^o As to chattels *real*, see Cro. Eliz. 278. 2 Vern. 312. Bunb. 105. and as to chattels

CHAPTER VIII.

Of the SERVICE of the COPY of PROCESS NOT BAILABLE: and of the CAUSE of ACTION and AFFIDAVIT necessary to authorize an ARREST.

BEFORE the making of the statute 12 Geo. I. c. 29. a defendant might have been arrested, upon process against the person, in civil actions, for any sum of money however trifling, or to any amount however considerable, without any affidavit of its being due. To remedy which, it was enacted by the said statute, *amended* by the 5 Geo. II. c. 27. made *perpetual* by the 21 Geo. II. c. 3. and extended to *inferior* courts by the 19 Geo. III. c. 70. that

“ in all cases, where the cause of action shall not
 “ amount to the sum of *ten pounds* or upwards,
 “ and the plaintiff or plaintiffs shall proceed by way
 “ of process against the person, he, she, or they
 “ shall not arrest, or cause to be arrested, the body
 “ of the defendant or defendants; but shall serve
 “ him, her, or them, personally, within the jurisdiction of the court, with a copy of the process; upon which shall be written an English notice to such defendant, of the intent and meaning of such service; for which no fee or reward shall
 “ be

“ be demanded or taken: provided nevertheless,
 “ that in particular franchises and jurisdictions,
 “ the proper officer there shall execute such pro-
 “ cess.”

“ That in all cases, where the plaintiff's cause of
 “ action shall amount to the sum of *ten pounds* or
 “ upwards, an *affidavit* shall be made and filed of
 “ such cause of action; which affidavit may be made
 “ before any judge or commissioner of the court,
 “ out of which such process shall issue, authorised
 “ to take affidavits in such court, or else before the
 “ officer who shall issue such process, or his deputy;
 “ which oath such officer or his deputy are impow-
 “ ered to administer; and for such affidavit one
 “ shilling, over and above the stamp-duties, shall
 “ be paid, and no more: and the sum or sums,
 “ specified in such affidavit, shall be indorsed on
 “ the back of such writ or process^a; for which sum
 “ or sums, so indorsed, the sheriff or other officer,
 “ to whom such writ or process shall be directed,
 “ shall take bail, and for no more^b.”

“ And that if any writ or process shall issue for
 “ the sum of *ten pounds* or upwards, and no affida-
 “ vit and indorsement shall be made as aforesaid,
 “ the

^a Append. Chap. IV. § 16. 22. and does not avoid the process, where the sum sworn to is not

^b This part of the statute is indorsed upon it. 1 Bur. 330. merely *directory* to the sheriff; Barnes, 414. 1 H. Blac. 76.

“ the plaintiff or plaintiffs shall not proceed to arrest
 “ the body of the defendant or defendants, but shall
 “ proceed in like manner as is directed by the statute
 “ 12 Geo. I. in cases where the cause of action does
 “ not amount to the sum of *ten pounds* or upwards.”

It is curious to remark the changes which the law of arrest has undergone at different periods: Anciently, as no *capias* lay, an arrest was not allowed, except in actions of trespass *vi & armis*: afterwards, an arrest was introduced with the *capias*, in other actions: and now, by the operation of the before-mentioned statutes, an arrest cannot be had in the only action wherein it was formerly allowed.

Three cases are provided for by these statutes; first, where the cause of action does not amount to *ten pounds*; secondly, where it amounts to *ten pounds* or upwards, and no *affidavit* is made thereof; thirdly, where it amounts to *ten pounds* or upwards, and there is an *affidavit* made and filed of the cause of action^c. In the two first cases, the process against the person is *not bailable*^d; and the defendant cannot be arrested thereon, but must be personally served with a *copy* of it; on which there must be written an English *notice*, of the intent and meaning of such service^e; which in effect reduces

^c Prac. Reg. 350.

^d This is frequently called *common* or *serviceable* process; though the term *common* seems

more properly confined to the bill of Middlesex or *latitat*, &c. without the clause of *ac-etiam*.

^e Append. Chap. VIII. § 1

duces it to a mere *summons*^f. This notice is required by the statutes, where the cause of action amounts to *ten* pounds or upwards, and no affidavit is made thereof, as well as where it does not amount to ten pounds^g. And it must be directed to the defendant^h; for if his name be not prefixed thereto, the process is irregular, and may be quashed on motion. And it should require the defendant to appear at the return of the processⁱ, though it happen on a Sunday^j. If there be no notice to appear^k, when necessary, or the notice be not properly directed^l, &c. the defendant may move the court to set aside the proceedings. But any trifling informality in the notice, as setting down the day of the *month*, on which the defendant is to appear, without saying *instant*, *next*, or specifying the *year*, will not invalidate it^m.

The copy of process to be served on the defendant, must be a copy of such process as he might have been arrested upon, before the statute 12 Geo. I. c. 29.:

^f Cowp. 455.

^g 7 T. R. 337. Barnes, 404. Pr. Reg. 349. Cas. Pr. C. B. 100. 143. 1 Sel. Pr. 83. but see 1 Wils. 22. *contra*.

^h Kelynge, 131. 1 Wils. 104.

ⁱ ——— v. *Hanson*, T. 42 G. III.

^j 3 Bur. 1600. In the com-

mon pleas, the day inserted in the notice to appear to a common *capias*, must be the actual return-day of the writ. 2 Bos. & Pul. 340.

^k 2 Str. 1072.

^l Kelynge, 131. 1 Wils. 104. 2 Bos. & Pul. 38.

^m 2 Str. 1233. Barnes, 425.

c. 29.: and therefore, where the proceedings are by *original*, he should be served with a copy of the *capias*, and not of the *original writ of summons or attachment*^a. But where the defendant is in a county palatine, he should be served with copy of the process issuing out of this court; and not of the *mandate*, from the officer to whom it is directed^o. The copy of the process may be served by the sheriff or his officers, (except in particular franchises, having the return of writs,) or by any one else^p, provided he be able to examine the copy with the original, so as to swear (if necessary) to the service. In particular franchises and jurisdictions, the proper officer there should execute the process^q.

Formerly, a copy of the process must have been served on the defendant, *before* the return day^r; but now it is holden, that service at any time, even after the rising of the court, *on* the return day, is sufficient^s. A bill of *Middlesex* should not be served in *London*, or elsewhere out of the county of *Middlesex*; nor whilst the defendant is attending his cause at the sittings^t: but where there is any dispute as to the boundaries of the county, the court will not determine it on motion^v. And it is now settled

^a Barnes, 406. 410.

^r Barnes, 415. 424.

^o 2 Barnardist. 318. 327.
337. 398. Pr. Reg. 344.
Barnes, 406.

^s 2 Bur. 812. 1 T. R. 192.
Pr. Reg. 352. 2 Wils. 372.

^p Pr. Reg. 345.

^t Doug. 384. 1 T. R. 187.

1 Esp. Cas. *Ni. Pri.* 42.

^q Stat. 5 G. II. c. 27. § 3.

^u 2 Str. 1094.

^v 1 Wils. 77.

settled, that a *latitat* may be served in *Middlesex*, or any other county ^w. On serving the copy, it is not necessary, though usual, to shew the original process ^x, unless demanded ^y. And in an action against husband and wife, it is deemed sufficient to serve the husband only ^z.

If, upon the service, the defendant speak contemptuous words of the *court*, or its *process*, he is liable to an *attachment*. And where the words are spoken of the *court*, the attachment issues in the first instance ^a; for it would be to no purpose to grant a rule to shew cause, which would probably expose the court to further insult ^b. It has been doubted however, whether, when such words are sworn to by one person only, the rule should be absolute, or only to shew cause ^c; the rule in *chancery* requiring two affidavits, to deprive the party of the benefit of shewing cause: and in this court, the rule is only to shew cause, where the words are spoken of its *process* ^d.



Where the cause of action amounts to *ten* pounds or upwards, and an *affidavit* thereof is made and filed

^w Doug. 384. 1 T. R. 187.

6 T. R. 74. 8 T. R. 235.

^x 2 Str. 877. Barnes, 422.

^y Cas. temp. Hardw. 138.

^z Barnes, 406. 412. Pr. Reg. 351. S. C.

^a 6 Mod. 43. 1 Salk. 84.

1 Str. 185. Say. Rep. 47. R.

T. 17 G. III.

^b 1 Salk. 84.

^c 2 Str. 1068.

^d Say. Rep. 114.

filed according to the statute, the process is *bailable*; and the defendant may in general be arrested, and holden to special bail. But by a statute^e made previous to, and not repealed or altered by the 12 Geo. I. c. 29.^f “no sheriff shall hold any person to “special bail, in *Wales* or the *counties palatine*, “upon any process issuing out of the courts at “*Westminster*, unless an affidavit be first made and “filed, of the cause of action, and that the same is “twenty pounds and upwards; and bail shall not “be taken for more than the single sum expressed “in the affidavit.”

With respect to the cause of action, it is a rule, upon the statute 12 Geo. I. c. 29. that where there is a certain *debt* to the amount of ten pounds, or *damages* to that amount, which may be reduced to a certainty, as in *assumpsit* or *covenant* for the payment of money^g, the defendant may be arrested, as a matter *of course*, on an affidavit shortly stating the cause of action. And he may be arrested in like manner, in an action of *trover*^h, or *detinue*; for these are more properly actions of property, than of *tort*. But it is saidⁱ, that where the defendant, being a custom-house officer, was arrested in an action of *trover*, brought against him for seizing goods, and it appeared by affidavit that there was a reasonable

^e 11, 12 W. III. c. 9. § 2.

^f 2 Str. 1102.

^g Barnes, 79, 80. But one who became surety for the defendant, before his discharge under an insolvent-debtor's act, and was afterwards obliged to give a new security by bond and warrant of attorney, &c. for the old debt, cannot, before he has paid the money, hold

the defendant to bail thereon by affidavit, as for so much money paid for his use.” 3 East, 169.

^h 6 Mod. 14. 2 Str. 1192. 1 Wils. 23. S. C. 1 Wils. 335. Say. Rep. 53. S. C. and see Cowp. 529.

ⁱ 2 Blac. Rep. 1018. 1 Wils. 335. Say. Rep. 53. S. C. *Senb contra*.

a reasonable foundation for the seizure, that the goods were deposited in the king's warehouse, and that the defendant had used due diligence, in proceeding towards a condemnation in the exchequer, the court ordered common bail to be accepted.

On the other hand, where the damages are altogether *uncertain*^k, as in *assumpsit* or *covenant* to indemnify, &c. or in actions for a *tort* or *trespass*, there can be no arrest, without a *special order* of the court or a judge, on a full affidavit of the circumstances^l; for it would be unreasonable that the defendant should be arrested, for what damages the plaintiff fancies he has sustained, and is pleased to swear to. And it is not usual to grant a special order,

^k Barnes, 108.

^l An affidavit stating that the defendant was indebted to the plaintiff in 3000*l.* and upwards, being the value of certain bars of silver, delivered by the plaintiff or on his account to the defendant, to be by him carried and delivered, and by the defendant undertaken to be carried and delivered to *E. B.* at *Gottenburgh* in *Sweden*, for the use and on account of the plaintiff; but which bars of silver, or any part thereof, the defendant had

not carried or delivered to the said *E. B.* at *G.* aforesaid, or to any other person, or at any other place, for the use of the plaintiff, was deemed sufficient to hold the defendant to special bail, on a judge's order; although it was objected, that it did not state any debt owing from the defendant to the plaintiff, and that there was no averment that the plaintiff had any property in the silver, or was damaged by the non-delivery of it. 2 East, 453. but see 2 Bos. & Pul. 282.

order, except where there has been an outrageous battery or mayhem ^m, or the defendant is about to quit the kingdom.

There are also some cases, where the defendant cannot be arrested, though the action be brought for a sum *certain*; and others, where he cannot be arrested for the whole of the *legal* debt, but only for so much as is *equitably* due. Thus, in an action of *debt* on a *penal* statuteⁿ, the defendant cannot be arrested, though it be for a sum certain; as it is a *maxim*, that every man shall be presumed innocent of an offence, till he be found guilty: But where an action is brought on a *remedial* statute, as for money won at play^o, or on a statute which expressly authorises an arrest, as for exporting wool^p, double rent^q, having unsealed wrought silks^r, or insuring lottery tickets^s, &c. the defendant may be arrested. So, in an action of *debt* upon a *recognition* of bail, the defendant cannot be arrested; for the sufficiency of the bail must have been proved, or admitted, previous to their being allowed; and if the defendant were arrested in such an action, there

^m R. M. 1654. § 9.

Com. Rep. 75.

ⁿ Yelv. 53. Gilb. C. P. 37.

^q 4 Geo. II. c. 28. 5 T. R.

^o 9 Ann. c. 14. 2 Str. 1079.

364.

^r 7 T. R. 259. But see 2 Wils. 57.

^r 26 Geo. II. c. 21. 3 Bur 1569.

^p 10, 11 W. III. c. 10. § 20.

^s 27 Geo. III. c. I.

there would be bail *in infinitum*. And for similar reasons, an arrest is not permitted in an action of *debt* upon a *bail*^t or *replevin*^u bond; whether the action be brought in the name of the sheriff^v, or of his assignee. But after judgment has been obtained in such action, the defendant may be arrested in an action on the judgment^w.

A party cannot be arrested and held to bail for a *penalty*, but only for the sum secured by it^x. And hence it is, that in an action of *debt* upon bond, conditioned for the *payment of money*, though the penalty is, strictly speaking, the legal debt, yet as it is now considered, upon the statute for the amendment of the law^y, to be merely a security for principal, interest and costs, the defendant cannot be arrested for more than the sum really due by the condition. And, in like manner, where the bond is conditioned for the *performance of covenants*^z, or *to save harmless*, &c. the defendant ought not to be arrested for the penalty, but only for the amount of the damages, really sustained by the breach of the condition. He may be arrested, however, for the penalty of a bond conditioned for the

^t R. M. 8 Ann (c)

^u 1 Salk. 99.

^v 6 T. R. 336. 8 T. R. 450.

^w 8 T. R. 85.

^x 6 T. R. 217. 2 East, 409.

^y 4, 5 Ann. c. 16. § 13.

^z 1 Sid. 63. 1 Salk. 100.

Barnes, 109. Say. Rep. 109. Doug. 449.

the performance of a *promise of marriage*^a, &c. where the penalty is the real debt, or rather in nature of stated damages.

Where there have been *mutual* dealings between the parties, the *balance* is considered as the debt at law as well as in equity: and therefore, upon an unliquidated account, if the plaintiff were to swear to the sum due to him on the debtor side only, it would be looked upon as a mere evasion; and if not ground enough to support an indictment for perjury, would at least entitle the defendant to an action upon the case, for a malicious arrest^b.



The *affidavit* required by the statutes, of the cause of action, may be made by the plaintiff, his wife or a third person: and it may be made by one or several persons. The affirmation of a *quaker* is sufficient to hold the defendant to special bail. But the affidavit or affirmation must be made by some person who is legally competent to be a witness; therefore it is bad, if made by a person convicted of felony, or other infamous crime^c. And the true place of abode and addition of every person making the affidavit, must be inserted therein.

^a 1 Wils. 62. 3 Bur. 1351.
1373. Doug. 449.

^b Dr. *Turlington's* case,
4 Bur. 1996.

^c 5 Mod. 74. 2 Salk. 461.
Barnes, 79. 2 Str. 1148.
2 Wils. 225. but see Barnes,
116. *contra*.

in^d. But there is no occasion to insert the addition and description of the *defendant*^e. The affidavit may be sworn before a judge, or commissioner of the court, authorised to take affidavits, by virtue of the statute 29 *Car. II. c. 5.* or else before the officer who issues the process, or his deputy: And it may be sworn before a commissioner, although he be concerned as attorney for the plaintiff^f. If made by two or more deponents, the names of the several persons making it must be written in the *jurat*^g.

There being no action depending in court, at the time when the affidavit is made, it ought not regularly to be *intituled* in a cause; and in one case, the court discharged the defendant out of custody on common bail, on account of its being so intituled^h. But in a subsequent caseⁱ, they thought that as the practice had obtained so long, of adding a title to affidavits of this kind, it would be too much to determine, that such practice had been erroneous; particularly as this was a mere question of form, and did not interfere with the justice of the case: but a rule of court has been since made, that affidavits of any cause of action, before process sued out to hold defendants to bail,

^d R. M. 15 *Car. II.* 1 East, 18. 350. “ But a foreigner

whose general residence is abroad, and who only landed here for a temporary purpose, may properly describe his place of abode to be in his own country, and not at the place where the affidavit was

sworn.” 3 East, 154.

^e *Per Cur.* T. 41 G. III.

^f R. E. 15 G. II. B. R. 2. R. E. 13 G. II. C. B. but see Barnes, 37. C. B. *contra*.

^g *Per Cur.* M. 42 G. III.

^h 6 T. R. 640. and see Say. Rep. 218.

ⁱ 7 T. R. 321

bail, be not *intituled* in any cause, nor read if filed^k. It is no objection to an affidavit to hold to bail, that it is not intitled *In the King's Bench*; or that it appears to have been taken before A. B. a *commissioner*, &c. without adding *of the court of King's Bench*, if in fact he were a commissioner of that court^l.

An affidavit made *abroad*, out of the king's dominions, will not be received here^m. But the court will take cognizance of affidavits sworn in *Scotland* or *Ireland*, or elsewhere in the king's dominions, if properly authenticated, by proof of the handwriting of the persons before whom they are sworn, and of there being such officers as are authorised to take the sameⁿ. Such affidavits ought to contain all the requisites that are essential to affidavits for holding to bail in *England*; and therefore it was deemed necessary to state in an affidavit made in *Ireland*, for the purpose of arresting the defendant in this country, that he had not made a tender of the money in bank notes^o.

In point of *form*, the affidavit should be *direct* and *positive*, that the plaintiff has a *subsisting* cause
of

^k R. M. 38 Geo. III. 7 T. G. III. 7 T. R. 251. 1 Sel. R. 454. and see 1 Bos. & Pul. Pr. 117. *Haydon v. Federici*, E. 38 Geo. III.

^l 7 T. R. 451.

^o *Nesbitt v. Pym*, 7 T. R.

^m 2 Str. 1209. 2 Bur. 655. 376. *in notis*. *Stewart v. Smith*,

ⁿ *Per Lord Kenyon*, T. 36 1 Bos. & Pul. 132. *in notis*.

of action; and therefore, if it be merely by way of *argument*^p, or *reference* to books or accounts, &c. or as the party making it *believes*, it will not in general be sufficient^q. But an affidavit that the defendant is indebted to the plaintiff in such a sum, *as he computes it*, has been adjudged good^r. And where the plaintiff sues as *executor* or *administrator*, or as *assignee* of a bankrupt, it is sufficient for him to swear, that the defendant is indebted, &c. *as appears by books, &c. and as he verily believes*^s: but even in that case, a mere *reference* to books, &c. unsupported by the party's *belief*, is not sufficiently positive^t. A co-assignee of a debt, arising out of bills of exchange in his own possession, may sue in the name of the original creditor, and hold the defendant to bail on his own affidavit, swearing positively as to all the facts required, which are within his own knowledge, and to the best of his knowledge and belief, as to such as are within the knowledge of his principal and co-assignees^u. And where the *assignee* of a bond swore, that the obligor was indebted in ninety pounds,

for

^p 5 T. R. 364.

VIII. § 2, &c.

^q 2 Str. 1157. 1209. 1219.

^r 2 Bur. 1032.

1226. 1270. 1 Wils. 121.

^s 4 Bur. 1992. 2283. 1 T.

221. 279. 339. Say. Rep.

R. 83. 4 T. R. 176. 8 T.

59. S. C. 2 Bur. 655. 3 Bur.

R. 419, 20. 2 Bos. & Pul.

1447. 1687. 4 Bur. 2126.

298. and see Append. Chap.

1 T. R. 716. 2 T. R. 55.

VIII. § 52. 55, 6.

3 T. R. 575. For the *forms*

^t 2 Str. 1219. 1 T. R. 83.

of affidavits in different cases,

^u 8 T. R. 418.

see the Appendix to Chap.

for principal and interest upon the bond, *as he believed*, the affidavit was deemed sufficient to hold the defendant to special bail^v: But it is usual, in such case, for the obligee and assignee to join in an affidavit, stating the execution of the bond, the assignment of it, and how much is due for principal and interest^w.

It is also requisite, that the affidavit should be *certain* and *explicit*, as to the nature of the cause of action: Therefore an affidavit that the defendant is indebted to the plaintiff in such a sum upon *promises*^x, or in so much upon a bond for *performance of covenants*^y, or *upon breach of articles*^z, has been holden to be too general. But it has been deemed sufficient to state, in an affidavit to hold to bail, that the defendant is indebted to the plaintiff in such a sum, “for money had and received on “account of the plaintiff,” without adding “received *by the defendant*.” And an affidavit made by a married woman, that the defendant was indebted, for the rent of lodgings, and for money lent *by her* to the defendant, was held sufficient; although it did not state to whom the lodgings were let, and the person making the affidavit was herself

^v 1 Wils. 232.

^z *Booker v. Friend*, cited in

^w 2 Bos. & Pul. 353. and Say. Rep. 109. *Per Cur. M.* see Append. Chap. VIII. 41 G. III.

§ 43.

^a 8 T. R. 338. and see

^x Doug. 467.

Id. 27.

^y Say. Rep. 109.

self incapable of lending money: for she might have lent it, as agent to her husband^b.

An affidavit to hold to bail for *stipulated* damages, for not performing an agreement, must state what the agreement was, and the breach of it^c. And as a party cannot be held to bail for a *penalty*, but only for the sum secured by it, an affidavit stating "that the defendant was indebted to the plaintiff in 1000*l.* under an agreement in writing, whereby the defendant undertook to pay the plaintiff the balance of accounts, &c. which balance is still due and unpaid," is insufficient, without stating that the balance was 1000*l.*^d. So, an affidavit stating that the defendant was indebted to the plaintiff in 50*l.* by virtue of an agreement, whereby he bound himself in that sum for the performance of the said agreement, and which he had neglected and refused to perform, without stating what the agreement was, or the breach of it, is not sufficient^e. Where an affidavit stated, that the defendant was indebted to the plaintiff in 245*l.* for money lent by plaintiff to defendant, for the use of another, and for which the defendant promised to be accountable, and to repay or cause to be paid or *secured* to the plaintiff, &c. the defendant was discharged on common bail; it not appearing in the affidavit,

^b *Per Cur.* T. 40 G. III.

^d 6 T. R. 217.

^c 6 T. R. 13. *Per Cur.* H.

^e 2 East, 409.

41 G. III. 2 East, 409.

affidavit, but that the money had been secured, according to the agreement^f.

An affidavit to hold to bail in *trover*, stating that “the defendants had possessed themselves of certain goods, &c. of the plaintiff, *and of other persons*^g ;” or that “the plaintiff’s cause of action against the defendant, was for converting and disposing of divers goods of the plaintiff, of the value of 250*l.* which he refused to deliver, though the plaintiff had demanded the same, and that neither the defendant nor any person on his behalf had offered to pay to the plaintiff the 250*l.* or value of the goods^h,” has been deemed insufficient. In this action, it is too uncertain to swear that the defendant *now has, or lately had in his possession*, goods, &c. of the plaintiff; but the affidavit should state, that he has *possessed* himself of goods, &c. which he has unlawfully converted to his own useⁱ. And in order to hold to bail in *trover*, for a bill of exchange, it should be stated that the bill remains unpaid^k.

An affidavit to hold to bail on the *lottery* act, must specify the nature of the offence, and aver that the defendant has incurred the forfeiture^l: but the offence need not be described circumstantially,
nor

^f 5 T. R. 552. and see 2 Bos. & Pul. 48.

^g *Per Cur.* T. 42 G. III.

^h 7 T. R. 550.

ⁱ *Per Cur.* E. 37 G. III

and see Append. Chap. VIII § 58, &c.

^k 7 T. R. 321.

^l 1 T. R. 705.

nor is the plaintiff obliged to swear, that the defendant is indebted to him in the amount of the penalty ^m: In such an affidavit, several offences of the same nature may be included ⁿ; and it need not state that the defendant received any consideration for making the insurances, or set out the plaintiff's authority to bring the action ^o.

By the *Bank acts* ^p, the affidavit to hold to bail must state, that “no offer has been made to pay the sum sworn to, in notes of the governor and company of the bank of England, expressed to be payable on demand, (fractional parts of the sum of 20s. only excepted.)” These acts of parliament have been construed to extend to affidavits made in *Ireland*, for the purpose of being used in this country ^q. Where the affidavit is made by the *plaintiff*, it must be particularly sworn that *no* tender or offer has been made, as required by the acts: and in this court, an affidavit that the *defendant* had not tendered the said sum, or any part thereof, in bank of England notes, was held insufficient ^r; lord *Kenyon* observing, that the court had better abide by the words of the acts of parliament. But in the Common pleas, it is otherwise; for

^m 2 T. R. 654.

III. c. 18.

ⁿ 4 T. R. 228.

^q *Nesbitt v. Pym*, 7 T. R.

^o 6 T. R. 640. and see 376. *in notis. Stewart v. Smith*,
Append. Chap. VIII. § 47. 1 Bos. & Pul. 132. *in notis.*

^p 37 Geo. III. c. 45. § 9. S. P. *Ante*, 156.

37 Geo. III. c. 91. § 8. 38 ^r *Per Cur. M.* 42 G. III.
Geo. III. c. 1. § 8. 43 Geo.

for it is there holden, that such an affidavit excludes the possibility of a tender by any one else: and if any other person had made an offer *for* the defendant, it would have been tantamount to an offer *by* him^s. So if an affidavit negative a tender in notes of the governor and company of the bank of England, payable on demand, it is sufficient; though the words of the statute are “*expressed to be payable on demand*”^t.

In an affidavit to hold to bail for an *integral* sum, *e. g.* 20*l.* and upwards, it is sufficient to negative a tender of *the said sum* in bank notes; that having reference to the specific sum sworn to, which was such as might have been so tendered^u: But it is not sufficient in such a case to negative a tender of the *said sum and upwards*. 3 East, 110. And in an affidavit to hold to bail for a *fractional* sum, in pounds shillings and pence, it is not enough to negative a tender of *the said sum* in bank notes; for *non constat* but a tender in bank notes was made of all but the fractional sum, which would have been sufficient within the statutes^v. In this case therefore, it is usual to swear that no tender or offer has been made, to pay the said sum, or any part thereof^w.

If

^t 1 Bos. & Pul. 344.

^u 2 Bos. & Pul. 48.

^v 2 East, 1.

^w *Id.* 17. So an affidavit in such case, negating a tender of the *sum*, omitting *said*, is insufficient. *Per Cur.* M. 42 Geo. III.

^w An affidavit that no offer had been made, to pay the sum of 93*l.* 2*s.* 6*d.* in notes, &c. or any fractional part of the sum of 20*s.* was held insufficient. *Per Cur.* M. 42 Geo. III.

If the affidavit be made by an *agent*, the plaintiff being abroad, it is sufficient to negative a tender of the debt in bank notes, "*as the agent believes* ^x:" and in an action brought by the corporation of *London*, for use and occupation, an affidavit sworn by a clerk in the chamberlain's office, as to the existence of the debt, and that no tender of it had been made in bank notes, *to the best of his knowledge and belief*, was held sufficient^y. But in general, where the principal resides here, it is not sufficient for his agent to negative a tender of the debt in bank notes, to the best of his knowledge and belief; but such tender must be positively negatived^z. And in the Common pleas, an affidavit to hold to bail, made by the plaintiff's agent, is bad, though it expressly negative a tender in bank notes^a; unless it appear in the original affidavit, or in an explanatory one, that the agent had some particular reason for knowing that no tender had been made^b: But in this court, an affidavit made by the agent of the plaintiff, expressly negating a tender of the debt in bank notes, to his principal as well as to himself, is sufficient; though the plaintiff himself be not therein stated to reside abroad^c.

If

^x 8 T. R. 284.

^y 1 East, 237.

^z 8 T. R. 520. 2 East, 24. S. P.

^a 2 Bos. & Pul. 339. 389.

So in an action by the assignees of a bankrupt, it is not sufficient, in the common pleas,

for the bankrupt to negative a tender in bank notes. 3 Bos. & Pul. 219.

^b 2 Bos. & Pul. 390. 420. 590.

^c *Maddox v. Abercromby*, H. 41 G. III. 1 East, 415.

If the affidavit be made by one of several *partners*^d or *assignees*^e, it is sufficient for the party making it to negative a tender in bank notes to himself, positively, or to either of his partners or co-assignees, to the best of his knowledge and belief: And an affidavit to hold to bail, made by an *administrator* of a person who died before the passing of the Bank acts, need not negative a tender in bank notes to the intestate^f. But in an affidavit to hold to bail, made by the *assignees* of a bankrupt, it is not sufficient to negative a tender of the debt in bank notes to the assignees; but it must be sworn also, that no such tender was made to the bankrupt, before his bankruptcy^g: In this case therefore, it is usual for the bankrupt and one of his assignees to join in the affidavit, the former negating a tender before, and the latter after the bankruptcy.*

Lastly, it is a general rule, that the affidavit to hold to bail should be *single*; and therefore if it contain two or more different causes of complaint, that cannot be joined in the same action, either at the suit of one or several plaintiffs^h, or against oneⁱ or several^k defendants, it is irregular, and the

^d 2 Bos. & Pul. 390.

tender to their intestate.

^e 8 T. R. 418. 520. 2 Bos. & Pul. 590.

^g 8 T. R. 455.

^h 6 T. R. 688.

^f 3 Bos. & Pul. 6. and *Rooke* J. added, that he thought it unnecessary in any case, for persons suing as administrators to negative a

ⁱ 5 Bur. 2690.

^k *Doug.* 217. 4 T. R. 577. 695. 5 T. R. 254. 722.

* *From the addenda to the London edition.* "The affidavit however need not now be very particular in negating a tender in bank notes; for by the statute 43 Geo. III. c. 18. § 2. it is enacted, that "in case "of any application to any of His Majesty's courts in *Westminster-hall*, "by any person who has been or shall be held to special bail, under "or by virtue of any process out of such court, to be discharged upon "common bail, by reason of any defect in such part of the affidavit "on which he is so held to bail, as negatives or is intended to negative "any offer having been made to pay the sum in such affidavit mentioned, in notes of the Governor and Company of the bank of *England*, the person or persons making such application so to be discharged.

the court on motion will set aside the proceedings.

If there be *no* affidavit, or if the affidavit be *defective*¹, or not duly *filed*^m, or if the sum sworn to be not *indorsed* on the writⁿ, the court will discharge the defendant upon common bail. But if the affidavit be merely informal, the defendant cannot object to it, after he has *voluntarily* given a bail bond^o, put in^p or perfected^q bail above, taken the declaration out of the office^r, pleaded to the action^s, or let judgment go by default^t. And it is a rule, that the court will not go out of the affidavit, or prejudge the cause, by entering into the merits upon which it is founded^u. The plaintiff therefore must stand or fall by his affidavit; it being the constant and uniform practice of this court, in cases of arrest, not to receive a *supplemental* or *explanatory* affidavit on the part of the plaintiff^v, nor a *counter* or *contradictory* one on the part of the defendant^w. Even an affidavit of the

¹ 7 T. R. 375.

^m *Hussey v. Baskerville*, cited in 2 Wils. 225.

ⁿ 1 Bur. 332. 2 Wils. 69.

^o 7 T. R. 375.

^p 1 East, 330.

^q *Id.* 81. 1 Bos. & Pul. 132. S. P.

^r 7 T. R. 451.

^s *Id.* 376. *in notis*, and see 1 East, 77.

^t 8 T. R. 77. 1 East, 19. *in notis*. S. C.

^u 1 Salk. 100. but see 3 East, 169.

^v But it is otherwise in the common pleas. 2 Bos. & Pul. 298.

^w 2 Str. 1157. 1 Wils. 335. Say. Rep. 53. S. C. 2 Wils. 225. 1 Blac. Rep. 192. 1 Bur. 655. 4 Bur. 2017. Doug. 450. 467. 1 T. R. 716. 5 T. R. 552, 3. *Spragg v. Young*, H. 35 G. III.

“ed, shall not be entitled to such discharge, unless he, she or they shall at the same time make proof, by affidavit, that the whole sum of money, for which he she or they has or have been so held to bail, had been or was, before such holding to bail, offered to be paid, either wholly in such notes, or partly in such notes and partly in lawful money of this kingdom.”

the plaintiff's confession, that the defendant owes him nothing, will not be received^x. This practice however must be understood with reference to the merits of the cause; it being competent to the defendant to shew by a *counter-affidavit*, that he was privileged from arrest, or had been before holden to bail in this country, for the same cause of action^y.

^x 1 Wils. 335.

^y 2 East, 453.

CHAPTER IX.

Of the ARREST upon BAILABLE PROCESS.

HAVING in the preceding chapter shewn for what cause, and upon what *affidavit*, a defendant may be arrested and held to special bail; I shall next consider the *privilege* from arrest, which is *personal*, *local*, or *temporary*; and by whom, under what authority, and in what manner the arrest may be made.

Where the defendant is not subject to a *capias*, he cannot be arrested and held to special bail. The *king* or *queen* therefore, and *royal* family, are of course privileged from arrest: and it is holden that the *servants in ordinary* of the king or queen *regent*, though subject to a *capias*, ought not to be arrested, even upon process of execution^a, without notice first given to, and leave obtained from the lord chamberlain of his majesty's household^b. But the servants of the queen *consort* or *dowager* have no such privilege^c.

By the law of nations, as *declared* by the statute 7 Ann. c. 12. *ambassadors*, and other *public ministers*^d, are privileged from arrest; as are also
their

^a 5 T. R. 686.^c 1 Keb. 842. 877.^b T. Raym. 152. 2 Keb. 3.
435.^d Cas. temp. Talb. 281.

4 Bur. 2016.

their domestic servants; it being enacted by the above statute, that “all writs and process against the “person or goods of an *ambassador*, or other *public* “*minister* of a foreign prince or state, or the *domestic servant* of such ambassador or public minister, shall be utterly null and void, to all intents and purposes whatsoever.” But it has been adjudged^c, that a defendant claiming the benefit of this act, as domestic servant to a public minister, must be really and *bonâ fide* his servant, at the time of the arrest^f; and must clearly shew by affidavit, the general nature of his service, the actual performance of it, and that he was not a trader or object of the bankrupt laws^g. For, by the law of nations, a public minister cannot protect a person who is not *bonâ fide* his servant. It is the law that gives the protection: and though the process of the law shall not take a *bonâ fide* servant out of the service of a public minister, yet, on the other hand, a public minister shall not take a person, who is not *bonâ fide* his servant, out of the custody of the law, or screen him from the payment of his just debts^h.

This privilege, however, has been long settled to extend to the servants of a public minister, being

^c 2 Str. 797. 2 Ld. Raym. Wils. 33.

1524. Fitzgib. 200. S. C. ^f *Flint v. De Loyant*, M. 40

1 Wils. 20. 78. 1 Blac. Rep. G. III.

48. 1 Bur. 401. 3 Bur. ^g See the statute. § 5.

1478. 1 Blac. Rep. 471. S. ^h 4 Bur. 2016, 17.

C. 3 Bur. 1676, 1731. 3

ing *natives* of the country where he resides, as well as to his *foreign* servantsⁱ; and not only to servants lying in his house, for many houses are not large enough to contain and lodge all the servants of some public ministers, but also to real and actual servants lying out of his house^j: Nor is it necessary, to entitle them to the privilege, that their names should have been registered in the secretary of state's office, and transmitted to the sheriff's office^k; though, unless they have been so registered and transmitted, the sheriff or his officers cannot be proceeded against for arresting them^l. And it is not to be expected, that every particular act of the service should be specified: 'Tis enough if an actual *bonâ fide* service be proved: And if such a service be sufficiently made out by affidavit, the court will not, upon bare suspicion, suppose it to have been merely colourable and collusive^m.

By the common law, *peers* of the realm of *England*ⁿ, and *peeresses* whether by birth or marriage^o, are constantly privileged from arrest in civil suits, on account of their dignity, and because they are supposed to have sufficient property, by which they may be compelled to appear: which privilege is

ⁱ 3 Bur. 1676.

a. Hob. 61. Sty. Rep. 222. 2

^j 2 Str. 797. 3 Wils. 35.

Salk. 512. 2 H. Blac. 272. 3

^k 4 Bur. 2017. 3 T. R. 79.

East, 127.

^l See the statute, § 5. 1

o 6 Co. 52. Sty. Rep. 252.

Wils. 20. and a late order.

1 Vent. 298. 2 Chan. Cas.

^m 4 Bur. 1481.

224.

ⁿ 6 Co. 52. 9 Co. 49. a. 68.

is extended, by the act of union with *Scotland*^p, to *Scotch* peers and peeresses; and by the act of union with *Ireland*^q, to *Irish* peers and peeresses. And they are not liable to be *attached*, for the non-payment of money, pursuant to an order of *nisi prius*, which has been made a rule of court^r. But this privilege will not exempt them from *attachments*, for not obeying the process of the court^s; nor does it extend to peeresses by marriage, if they afterwards intermarry with commoners^t. And though the *servants of peers*, necessarily employed about their persons and estates, could not formerly have been arrested^u, yet this privilege seems to have been taken away by the statute 10 Geo. III. c. 50^v.

By the law and custom of parliament, *members of the house of commons*^w are privileged from arrest, not only during the actual sitting of parliament, but for a convenient time, sufficient to enable them to come from, and return to any part of the kingdom, before the first meeting, and after the final dissolution

^p 5 Ann. c. 8. art. 23. and see Fort. 165. 2 Str. 990.

^q 39 & 40 G. III. c. 67. art. 4.

^r Ld. *Falkland's* case, E. 36 G. III. 7 T. R. 171. But it seems, that if bailable process be taken out against a *peer*, the sheriff is not a trespasser for executing it. Doug. 671.

^s 1 Wils. 332. Say. Rep. 50. S. C. 1 Bur. 631.

^t Co. Lit. 16. 2 Inst. 50. 4 Co. 118. Dyer, 79.

^u *Ordo dom. proc.* 28 Junii, 1715. 1 Mod. 146. 2 Str. 1065. 1 Wils. 278.

^v 5 T. R. 687.

^w Stat. 10 Geo. III. c. 50. 2 Str. 985. Fort. 159. Com Rep. 444. S. C.

dissolution of it; and also for *forty* days ^x after every prorogation, and before the next appointed meeting; which is now in effect as long as the parliament exists, it being seldom prorogued for more than fourscore days at a time ^y. And the court will not grai.⁺ an attachment, against a member of the house of commons, for non-payment of money pursuant to an award ^z.

Members of convocation are allowed, by statute^a, the same privilege from arrest in coming, tarrying, and returning, as members of the house of commons. And members of *corporations aggregate* ^b, and *hundredors* ^c, not being liable to a *capias*, cannot be arrested for any thing done in their corporate capacity, or on the statutes of hue and cry, &c.

Attornies and other *officers*, on account of the supposed necessity of their attendance, in order to transact the business of the court, are, generally speaking, privileged from arrest ^d. But the sheriff cannot take notice of their privilege ^e; nor is he bound to discharge them, even upon producing their writs of privilege, except where the arrest was by process issuing out of an *inferior* court, in which
case

^x 2 Lev. 72. 1 Chan. Cas. 221. S. C. but see 1 Sid. 29.

^y 1 Blac. Com. 165.

^z 7 T. R. 448.

^a 8 Hen. VI. c. 1. 1 Eq. Cas. Abr. 349.

^b Bro. tit. *Corporation*, 43.

^c 3 Keb. 126, 7.

^d 1 Mod. 10. but *vide post*, Chap. XIII.

^e Co. Lit. 131. 1 Salk. 1 and see Doug. 671.

case their writs of privilege ought to be allowed *instantanter*^f. If an attorney or other officer of the King's Bench be arrested, by process issuing out of the *same* court, he may move to be discharged on common bail^g: But an attorney or officer of a *different* court must find special bail, and plead his privilege in abatement^h.

All other persons, being subject to a *capias*, were formerly liable to be arrested. And indeed, before the statute 12 Geo. I. c. 29. where a *capias* was used, there was no other way of bringing them into court. But *executors* and *administrators* are privileged from arrest, where they merely act *en auter droit*, and have duly administered the effects of the deceasedⁱ: though where an executor or administrator hath personally promised to pay a debt or legacy^j, he may be arrested on such promise. So he may be arrested in an action of *debt* on judgment,

^f Cas. Pr. C. B. 2. 2 Blac. Rep. 1087.

^g 1 Mod. 10. 2 Salk. 544. 1 Wils. 298.

^h 2 Salk. 544. 2 Str. 864. 2 Ld. Raym. 1567. S. C. 1 Wils. 306. And *note*, there are two ways of pleading an attorney's privilege, first with a *profert* of a writ of privilege, or of an exemplification of the record of his admission; upon which the plaintiff must reply *nul tiel record*, and cannot otherwise deny the defendant's

being an attorney; secondly, as a mere matter of fact, without a *profert*: Lil. Ent. 3. and then a *certiorari* shall be awarded, to certify whether he be an attorney or not. 1 Ld. Raym. 336. 7 Mod. 106. 2 Salk. 545. 6 Mod. 305. 2 Ld. Raym. 1172. 1 Str. 76. 532.

ⁱ Yelv. 53. 2 Brownl. 293. 3 Bulst. 316. R. M. 15 Car. II. Gilb. C. P. 37.

^j 1 T. R. 716.

ment, suggesting a *devastavit*^k; if it appear by affidavit, or the sheriff's return^l, that he has *wasted* the effects of his testator or intestate.

In an action against *husband* and *wife*, the husband alone is liable to be arrested; and shall not be discharged, until he have put in bail for himself and his wife^m. If the wife be arrested by *mesne* process, she shall be discharged on common bail; and that, whether she be arrested singlyⁿ, or jointly with her husband^o. So in an action against the wife only, if it be clear and notorious that she is covert, common bail ought to be received^p: and where no fraud was intended, the court discharged her on common bail, though at the time of the credit given to her by the plaintiff, she informed him, by mistake, that her husband was dead^q: and common bail was ordered, in a case where the plaintiff, at the time of the credit given to the defendant, knew that she had a husband abroad, though under terms of separation from her^r. But in general, if her coverture be doubtful, or she has obtained credit by imposing herself on the plaintiff as a feme-sole,

^k 1 Sid. 63. 1 Lev. 39. ^o 1 Lev. 216. 1 Salk. 115.
Carth. 264. 1 Mod. 16. 1 6 Mod. 17. 2 Str. 1272. 1
Salk. 98. Highmore on *bail*, T. R. 486. K. B. Barnes, 96.
10. 3 Wils. 124. 2 Blac. Rep.

1 Comb. 206. 325. 720. S. C. C. B.
^m 1 Vent. 49. 1 Mod. 8. ^p 6 Mod. 105. 7 Mod. 10.
S. C. 6 Mod. 17. 86. R. E. 6 T. R. 451.
5 G. II. 1. (b) ^q 1 East, 16.

ⁿ Cro. Jac. 445. Pr Reg. ^r *March v. Capelli*, II. 39
65, 6. G. III. 1 East, 17. (a)

sole^s, she must find special bail. And where the wife is taken in *execution*, she shall not be discharged; unless it appear that there is fraud and collusion, between the plaintiff and her husband, to keep her in prison^t.

The *parties* to a suit, and their *witnesses*, are for the sake of public justice, protected from arrest, in coming to, attending upon, and returning from the court; or, as it is usually termed, *eundo, morando, et redeundo*^u. And this privilege has been holden to extend to all persons who have any relation to a cause, which calls for their attendance in court, and who attend in the course of that cause, though not compelled by process; such as bail, &c^v. Nor have the courts been nice in scanning this privilege, but have given it a large and liberal construction. Thus, where the defendant was attending his cause at the sittings, and though it was put off early in the day, stayed in court till five in the afternoon, and then went with his attorney and witnesses to dine at a tavern, where he was arrested during dinner; the court held, that such a necessary refreshment as this, ought not to be looked upon as a deviation, so as to

^s *Wilson* against *Campbell*, Rep. 720. S. C. C. B.
M. 20 G. III. 5 T. R. 194. ^u 2 Rol. Abr. 272. 2 Lil.
1 East, 16. P. R. 369. 1 Mod. 66. S. C.
^t 2 Str. 1167. 1237. 1 1 Vent. 11. Gilb. C. P. 207.
Wils. 149. K. B. Barnes, &c.
203. 3 Wils. 124. 2 Blac. 1 H. Blac. 636

to cancel the defendant's privilege *redeundo*^w. So where a witness, having attended a trial at Winchester assizes, which was over on Friday about four in the afternoon, was arrested on Saturday about seven in the evening, as she was going home in a coach to Portsmouth, the court held that she ought to be discharged, her protection not being expired; and that a little deviation or loitering would not alter it^x. There is a case in the year books^y, where a man was arrested in a town, which was forty miles out of his way, and yet was allowed his privilege; for perhaps, it is said, he went there to buy a horse, or other necessities for his journey. But the sheriff is not bound to take notice of the privilege of a witness^z: and the court would not discharge a person in custody by process of the sheriff's court, in a cause afterwards removed into this court, because he was arrested while attending *commissioners of bankrupt*, to prove a debt^a.

Seamen and *soldiers* are also, under certain circumstances, privileged from arrest. Thus, with regard

^w 2 Blac. Rep. 1113.

^x Gilb. Cas. K. B. 308. 2 Str. 986. S. C. cited.

^y Bro. tit. *Privilege*, 4.

^z 2 Blac. Rep. 1190.

^a 4 T. R. 377. *Tamen quare*; for in a late case, the *Chancellor* discharged a person who was arrested while attending the commissioners as a witness; and intimated, that a creditor attending to prove his

debt, would also be privileged from arrest. And see 1 Atk. 55. 2 Blac. Rep. 1142. 2 H. Blac. 636. It is likewise holden, that the party to a cause is privileged from arrest for debt, during his attendance on an arbitration, under an order of *nisi prius*, made a rule of court. 8 T. R. 536. *Spence v. Stuart*, M. 43 G. III. K. B. 3 East, 89.

regard to *seamen*, it is enacted ^b, that “ no person
 “ who shall serve as a *petty officer* ^c or *seaman*, or
 “ be embarked as a *non-commissioned officer* of ma-
 “ rines, or *marine*, on board any of his majesty’s
 “ ships or vessels, shall be liable to be taken out of
 “ his majesty’s service, by any process or execution
 “ whatsoever, either in *Great Britain*, *Ireland*, or
 “ any other part of his majesty’s dominions, other
 “ than for some criminal matter, unless such process
 “ or execution be for a real debt, which shall have
 “ been contracted by such petty officer or seaman,
 “ non-commissioned officer of marines, or marine,
 “ when he did not belong to any ship or vessel in
 “ his majesty’s service, or other just cause of ac-
 “ tion, and unless before the taking out of such
 “ process or execution, not being for a criminal
 “ matter, or for a debt contracted in the service as
 “ aforesaid, the plaintiff or plaintiffs therein, or
 “ some other person or persons on his or their
 “ behalf, shall make affidavit, before one or more
 “ judge or judges of the court of record, or other
 “ court out of which such process or execution
 “ shall issue, or before some person authorised to
 “ take affidavits in such courts, that to his or their
 “ knowledge, the sum justly due to the plaintiff
 “ or plaintiffs, from the defendant or defendants
 “ in the action, or cause of action on which such
 “ process

^b Stat. 1 Geo. II. stat. 2. the mates of the *warrant* of-
 c. 14. § 15. 32 Geo. III. c. ficers ; as of the purser, sur-
 33. § 22. geon, gunner, boatswain and

^c *Petty officers* seem to be carpenter.

“ process shall issue, or the debt or damage and
“ costs for which such execution shall be issued
“ out, amounts to the value of *twenty* pounds at the
“ least, and that such debt, so amounting to twenty
“ pounds or upwards, was contracted by the said
“ defendant, when he did not belong as aforesaid to
“ any ship in his majesty’s service; a *memorandum*
“ of which oath shall be marked on the back of such
“ process or writ, for which *memorandum* or oath
“ no fee shall be taken.”

A similar privilege is allowed, by the annual *mutiny acts*^d, to *volunteer soldiers*, who are not liable to be taken out of his majesty’s service, by any process or execution whatsoever, other than for some criminal matter, unless for a real debt, or other just cause of action; and unless, before the taking out of such process or execution, (not being for a criminal matter,) an affidavit shall be made as before-mentioned, that the original sum justly due and owing to the plaintiff or plaintiffs, from the defendant or defendants in the action, or cause of action on which such process shall issue, or the original debt for which such execution shall be sued out, amounts to the value of *twenty* pounds at least, over and above all costs of suit in the same action, or in any other action on which the same shall be grounded.

These

^d 37 Geo. III. c. 33, § 63.

These acts have been construed to extend not merely to *common* soldiers, and *troopers*^e in the life guards, &c. but also to *non-commissioned* or *warrant* officers, as gunners^f, serjeants, and drummers^g: For a *serjeant* is a soldier with a halbert; and a drummer is a soldier with a drum^h. These acts, however, do not extend to *commissioned* officers; nor to the case of *soldiers* imprisoned for disobeying orders of justicesⁱ, or on any other *criminal* account^k.

“ And if any *petty officer* or *seaman*, *non-com-*
 “ *missioned officer* of marines, or *marine*, or any
 “ *volunteer soldier*, shall nevertheless be arrested,
 “ contrary to the intent of the before-mentioned
 “ acts, it shall and may be lawful for one or more
 “ judge or judges of the court, out of which the
 “ process or execution shall issue, upon complaint
 “ thereof made by the party himself, or by any
 “ one of his superior officers, to examine into the
 “ same, by the oath of the parties or otherwise,
 “ and by warrant under his or their hands and
 “ seals, to discharge such petty officer, &c. so
 “ arrested, without paying any fee or fees, upon
 “ due proof made before him or them, that such
 “ petty officer or seaman, non-commissioned of-
 “ ficer of marines, or marine, was actually belong-
 “ ing to one of his majesty’s ships or vessels, or
 “ that

^e 1 Str. 2. Say. Rep. 107.

^h 1 Blac. Rep. 30.

^f 1 Str. 7.

ⁱ 2 T. R. 270.

^g 1 Wils. 216. 1 Blac.

^k 5 T. R. 156.

“ that such soldier was legally inlisted as a soldier
 “ in his majesty’s service, and arrested contrary to
 “ the intent of the before-mentioned acts; and also
 “ to award the party so complaining, such costs as
 “ such judge or judges shall think reasonable; for
 “ the recovery whereof, he shall have the like reme-
 “ dy, that the person who takes out the said execu-
 “ tion might have had for his costs, or the plaintiff
 “ in the like action might have had for the recovery
 “ of his costs, in case judgment had been given for
 “ him with costs, against the defendant in the said
 “ action¹. ”

By other acts of parliament^m, for the speedy and effectual recruiting of his majesty’s land forces and marines, “ no person, *listed* by virtue of those
 “ acts, shall be liable to be taken out of his majesty’s
 “ service, by any process, other than for some cri-
 “ minal matter.” But these latter acts were only meant to privilege such persons as were compelled to serve against their willⁿ; or rather to prevent their being taken out of the service, by means of *feigned* actions.

Bankrupts, who are not previously in custody, are exempted by statute^o, from the arrest of their creditors, in coming to surrender, and from their
 actual

¹ Stat. 1 Geo. II. c. 14.

^m 29 Geo. II. c. 4. § 14.

§ 15. 32 Geo. III. c. 33.

30 Geo. II. c. 8. § 20.

§ 22. 37 Geo. III. c. 33.

ⁿ 1 Bur. 339. 466.

§ 63.

^o 5 Geo. II. c. 30. § 5

actual surrender for two and forty days, or such further time as shall be allowed for finishing their examination; which privilege extends to all cases, except that of a surrender in discharge of bail ^p. And if a bankrupt surrender within the two and forty days, the commissioners may by their own authority, afterwards enlarge the time for taking his examination; during which enlarged time, he is privileged from arrest ^q. So it has been holden, that a bankrupt attending, upon notice for that purpose, a meeting of the commissioners, to declare a dividend of his estate, is protected from arrest, at the suit of a creditor, during such attendance, although several years after his last examination ^r. But the privilege we are now speaking of, is a *particular* privilege, to enable bankrupts to surrender, and till their actual surrender, is confined to the act of going with that view; not a *general* privilege, during the whole time which the act of parliament allows them for that purpose ^s. And they may be taken, in order to be surrendered by their *bail* at any time; even during their examination before the commissioners ^t.

When the time of privilege is expired, bankrupts who have not obtained their certificates, are liable to be arrested by their creditors, for debts contracted

^p 5 T. R. 209.

Ni. Pri. 117. S. C.

^q 8 T. R. 475. 3 Esp. Cas.

^s Cowp. 156.

Ni. Pri. 40. S. C.

^t 1 Atk. 238. Co. B. L. 113.

^r 8 T. R. 534. 3 Esp. Cas.

contracted previous to the act of bankruptcy. And the court would not discharge a defendant out of custody on common bail, on the ground that the plaintiffs, at whose suit he was arrested, were assignees under a commission of bankrupt, sued out above three years before, against the defendant, under which they had received dividends; though they suspended the execution of the rule on the sheriff to bring in the body, to give the defendant time to make application to the Lord Chancellor for relief^u. But after bankrupts have obtained their certificates, as they cannot be sued, so they are not liable to be arrested, for debts contracted prior to their bankruptcy^v; nor for the costs of any proceedings for the recovery of such debts, or of any interest thereon pending the commission^w. And if a plaintiff become bankrupt after he is nonsuited, and before the taxation of costs, the costs of the nonsuit are a debt proveable under the commission^x. But where the commission^y, or certificate^z, appears to be fraudulent, or the debt arises after the

^u 8 T. R. 364. and see S. C. Cowp. 138. 2 Blac. 1 Bos. & Pul. 302. 424. 3 Rep. 1317. 6 T. R. 282. Bos. & Pul. 6. So where the but see 1 Str. 477, 8.

plaintiff had petitioned for a sequestration in Scotland, against the defendant. *Carruthers v. Parkin*, H. 41 G. III. ^x 5 T. R. 365. and see 1 II. Blac. 29. but see the case *ex parte Todd*, cited in 3 Wils. 270.

^y Stat. 5 Geo. II. c. 30. ^y 2 Blac. Rep. 725. Cowp. § 7. 13. 2 Str. 949. 824.

^z 2 Str. 1196. 1 Wils. 41. ^z Doug. 228.

the bankruptcy, as upon a recognisance in error ^a, or bail-bond ^b, which was not then forfeited, the bankrupt may be arrested notwithstanding his certificate. And where a bankrupt, sued as executor, pleaded a false plea, between the issuing of the commission and the obtaining of his certificate, he was holden to be liable to costs for such plea, *de bonis propriis* ^c. So it has been holden, that a bankrupt may be arrested, upon a *subsequent* promise, for a debt contracted previous to his bankruptcy ^d. And where the plaintiff resided in this country, the court would not order an *exoneretur* to be entered on the bail-piece, on the ground that the debt was contracted while the defendant was resident in a foreign country, and before he became a bankrupt by the laws of that country, though he might have obtained his certificate there ^e. Where the defendant is entitled to the benefit of his certificate, he may be discharged by the statute two ways; first, by pleading his certificate, if in time; and secondly, by applying to a judge, upon an affidavit of the certificate ^f, when it is obtained after judgment ^g.

Insolvent debtors and fugitives discharged under

^a 2 Str. 1043.

^b 1 Bur. 436.

^c 3 Bur. 1368. 1 Blac.

Rep. 400. S. C.

^d *Best v. Barker*, M. 23

G. III. *Drew v. Jefferies*, H.

26 G. III. K. B. 2 Bur. 736.

contra; and see Cowp. 549.

^e 8 T. R. 609.

^f Doug. 676.

^g 1 Wils. 41.

der insolvent acts^h, are not liable to be arrested, even on *subsequent* promisesⁱ, for debts contracted *prior* to the times prescribed by the acts; but they may be arrested for debts contracted afterwards, and before they were actually discharged^j. The clauses respecting *fugitives* do not extend to persons who have constantly resided abroad^k; or who have been abroad merely in the course of their trade, and not for the purpose of avoiding their creditors^l. And it has been holden, that though certificated bankrupts, or persons discharged under insolvent acts, are privileged from arrest, yet the sheriff or his officer is not liable to an action of false imprisonment, for arresting them^m.

In some of the preceding cases, the process is declared to be void; as against *ambassadors*, &c. In others, the court is expressly required to discharge the defendantⁿ. And it may be remarked, in general, that where the defendant is entitled to privilege, as the arrest is irregular and unlawful, the court will discharge him upon motion; and not put him to the necessity of suing out a writ of privilege^o. But they will not discharge him out of custody on common bail, on the ground of *infancy*,

^h See the stat. 37 Geo. ¹ Say. Rep. 308.

III. c. 112.

^m Doug. 671.

ⁱ 2 Str. 1233. *sed vide ante*,
182.

ⁿ *Ante*, 178, 9.

^j Cowp. 527.

^o 2 Str. 989. Fort. 159.

Com. Rep. 444. S. C. 5 T.

^k 1 Wils. 85.

R. 689. but see 1 Wils. 272

fancy^p, or that he was *insane* at the time of the arrest^q, or afterwards became so^r; nor will they discharge his bail, on the ground of the insanity of their principal, although a commission of *lunacy* may have issued against him, under which he has been found a lunatic^s.

The defendant having been once arrested, cannot in general be arrested again, for the same cause of action^t. *Nemo debet bis vexari pro eâdem causâ*. Thus, where the defendant was arrested on a writ, taken out pending a prior action, wherein he had been previously arrested, for the same cause, the court discharged him on common bail^u. But where, in a similar case, it appeared that the bail in the prior action were forsworn, the court refused to assist the defendant; saying, the plaintiff was right in laying hold of him as he did; for had he discontinued, the defendant would probably have run away^v. So where A, having been arrested at the suit of B, gave him a draft for part of the demand, and agreed to settle the remainder in a few days; after which, the draft being dishonoured, B. sued out a new writ against A, and arrested him again on the same affidavit; this was holden to be regular^w. So where the defendant had been arrested abroad, it was holden that he might be again arrested here,

for

^p 1 Bos. & Pul. 480.

^q R. M. 15 Car. II. § 2.

^r 4 T. R. 121.

^u 2 Str. 1209.

^s 2 T. R. 390.

^v *Id.* 1216.

^t 6 T. R. 133. 2 Bos. & Pul. 362.

^w 6 T. R. 57.

for the same cause of action: at least, where it did not appear that the plaintiff could have had the same redress and benefit, by the proceedings abroad, as here ^x. And it has been determined, that the plaintiff, after suing out *common* process, may sue out a *bailable* writ for the same cause, and arrest the defendant, before he discontinues the first action; for this is not a case within the rule, of not permitting the defendant to be twice arrested for the same cause ^y.

The rule we are now speaking of, was formerly so rigidly adhered to, that where the plaintiff was *nonpros'd* for want of a declaration, he could not afterwards have arrested the defendant, in a second action ^z. But a different doctrine now prevails ^a; for the plaintiff is said to suffer enough by paying costs in the first action, and therefore ought not to be in a worse condition than before. For a similar reason, where the plaintiff, having misconceived his action, moves to discontinue upon payment of costs, he may, after the costs are taxed and paid ^b, take out a new writ for the same cause, and have the defendant arrested *de novo* ^c. And if the defendant be discharged
out

^x 7 T. R. 470. 2 East, 458.

and note, in the latter case, Lord *Ellenborough* expressed his dissent to the decision of the Court of C. P. in the case of *Melan v. the Duke de Fitz-James*, 1 Bos. & Pul. 138.

^y 6 T. R. 616.

^z 1 Ld. Raym. 679. Com Rep. 94. S. C.

^a 1 Str. 439.

^b 2 Str. 1209.

^c 2 Wils. 381.

out of custody, on account of some act for which the plaintiff is not answerable, such as an alteration in the warrant to arrest, by the sheriff's officer, without the plaintiff's knowledge, in such case the defendant may, after the first action is discontinued, be again held to bail for the same cause^d. But where the plaintiff, not liking the bail in the former action, obtained a side-bar rule for leave to discontinue, upon payment of costs, and afterwards proceeded to charge the defendant in custody, with a declaration in a new action, the court, conceiving this to be a trick, discharged the side-bar rule; so that the bail to the former action still continued liable^e. And wherever the second action appears to be *vexatious*^f, or the defendant is arrested or detained in custody therein, after being *superseded* or *supersedeable* in a former action, by the *laches* of the plaintiff^g, the court will discharge the defendant on common bail; even though he be arrested, on a note given subsequent to the *supersedeas*^h, or in a different form of action, so as to be substantially for the same cause. 3 East, 309.

Upon the same principle, of not permitting the defendant to be twice arrested for the same cause, it is holdenⁱ, that in an action of *debt* upon judgment, whether after verdict or by default, the defendant cannot be arrested, if he was previously arrested

^d 6 T. R. 218.

Wils. 93. Cowp. 72.

^e 4 Bur. 2502.

^h 2 Str. 1218.

^f 2 Blac. Rep. 809.

ⁱ *Id.* Say. Rep. 43. Pr. Reg.

^g 2 Str. 782. 943. 1039. 2 55, 6.

arrested in the original action; even though the bail in that action have since become *insolvent*^k, or the plaintiff has *released* them, by declaring in a different county^l, or the defendant has *surrendered* in their discharge, and obtained a *supersedeas*^m. But if the defendant were not arrested in the original action, he may be arrested in an action of debt on the judgmentⁿ. And where a cause in which the defendant has been arrested is referred to arbitration, and the arbitrator awards to the plaintiff a sum exceeding 10*l.*, the defendant may be arrested again, in an action upon the award^o.

It was formerly holden, that where the judgment was merely for *costs* upon a non-suit^p, or the debt was originally under ten pounds, but raised to a larger sum by the addition of costs^q; or the action was for *general* damages, which were reduced by the judgment to a sum *certain* above ten pounds^r; the defendant could not be arrested, either upon the judgment itself, or upon a subsequent promise, in consideration of forbearance^s, to pay the debt and costs. And now, by the statute 43 Geo. III. c. 46. §. 1. “no person shall be arrested or held to special bail, upon any process issuing out of any court in
“ *England*

^k Say. Rep. 160.

^p 5 Bur. 2660. 2 Blac. Rep.

^l 2 Wils. 93. but see 2 H. 1274. C. B. *contra*.
Blac. 278.

^q 2 Str. 975. 1077. 3 Bur.

^m 2 Str. 1039. R. H. 8 G. 1389. 4 Bur. 2117. but see 4
H. C. B. but see Cas. Pr. C. T. R. 570. Barnes, 432. *con-*
B. 34. *tra*.

ⁿ 8 T. R. 85. Pr. Reg. ^r 2 Str. 1243. 1 Wils. 120.
55, 6. ^s Cowp. 129.

^o 2 T. R. 756.

“ *England or Ireland*, for a cause of action not
 “ originally amounting to the sum for which such
 “ person is by the laws now in being liable to be ar-
 “ rested and held to bail, over and above and exclu-
 “ sive of any costs, charges and expences, that may
 “ have been incurred, recovered or become charge-
 “ able, in or about the suing for or recovering the
 “ same, or any part thereof.”

The privilege from arrest, we may remember, is *local* or *temporary*, as well as *personal*. With regard to the former, it is holden that no man can be arrested in his own house, provided the outer door be shut^u; or in the king's presence^v; or within the verge of his royal palace^w, (except by an order from the board of green cloth, or unless the process issue out of the *palace* court^x); or in any place where the king's justices are actually sitting^y. The privilege of the *parties* to a suit, and their *witnesses*, of which we have before spoken^z, may also in some measure be considered as of a *local* nature: And of the same kind is that of *Clergymen*, who, by several ancient statutes^a, are privileged from arrest, in going to and returning from church, or performing divine service; but not if they

^u 5 Co. 91. but see Cowp.

1.

^v 3 Blac. Com. 289.

^w Stat. 28 Hen. VIII. c.

12. 2 Id. Raym. 978. 3 Saik.

91. 284. 6 Mod. 73. Holt,

590. S. C.

^x 3 T. R. 735.

^y 3 Inst. 140, 1. 2 Mod.

181. but see 1 Lev. 106.

^z *Ante*, 174, 5.

^a 50 Edw. III. c. 5. 1 R.

II. c. 15. and see 1 Mar. sess

2. c. 3.

they stay in church, with a fraudulent design of eluding the process of the law. And it is said, that the party grieved may have an action upon these statutes ^b.

The King hath moreover a special prerogative, (which indeed is very seldom exerted) that he may by his *writ of protection*, privilege a defendant from all personal, and many real suits, for one year at a time, and no longer; in respect of his being engaged in his service out of the realm. And the king also, by the common law, might take his debtor into his protection, so that no one might sue or arrest him, till the king's debt were paid: but by the statute 25 Edw. III. st. 5. c. 19. notwithstanding such protection, another creditor may proceed to judgment against him, with a stay of execution, till the king's debt be paid; unless such creditor will undertake for the king's debt, and then he shall have execution for both ^c.

Lastly, by the statute 29 Car. II. c. 7. § 6.
 “no person or persons, upon the Lord's day, shall
 “serve or execute, or cause to be served or ex-
 “ecuted,

^b 12 Co. 100. In 5 Bac. Abr. 565. it is said, that the arrest of a clergyman under civil process, either in going to church, to perform divine service, or in returning from thence, on any day, is a false imprisonment. But from several later decisions, it may be

collected, that if any action would lie, which is doubtful, it should be an action on the case, and not an action of *tresspass*, against the sheriff or his officers. 3 Wils. 341. 2 Blac. Rep. 1087. 1190. Doug. 671.

^c 3 Blac. Com. 289, 90.

“ ecuted, any writ, process, warrant, order, judg-
 “ ment or decree, except in cases of treason, fe-
 “ lony or breach of the peace; but the service of
 “ every such writ, &c. shall be void, to all intents
 “ and purposes ^d: and the person or persons so
 “ serving or executing the same, shall be as liable
 “ to the suit of the party grieved, and to answer
 “ damages to him for doing thereof, as if he or
 “ they had done the same, without any writ, &c.”

In construing this statute, it has been holden, that an arrest cannot be made on a Sunday, for non-payment of a *penalty*, upon conviction ^e. And where A was arrested at the suit of B, and discharged, the sheriff not knowing that there was also a detainer in his office, at the suit of C, and on the Sunday following he was arrested at C's suit, the court discharged him out of custody ^f; considering the arrest on the Sunday as an original taking, or as a retaking of a *voluntary* escape ^g; and in either case it was prohibited by the statute. But after a *negligent* escape, the defendant may be retaken on a Sunday; and that, either by the officer upon fresh pursuit, or by virtue of an escape warrant ^h: for this is not an original taking, but the party is still in custody upon the old commitment. Also it is holden, that bail may take their
 principal

^d 1 Salk. 78. “ The service of process on a *Sunday* being absolutely void by the statute, cannot be made good by any subsequent waiver of the defendant, as by his not objecting until after a rule to plead

given.” 3 East, 155.

^e 1 T. R. 265.

^f 5 T. R. 25.

^g Barnes, 373.

^h 2 Ld. Raym. 1028. 2 Salk. 626. 6 Mod. 95. S. C.

principal on a Sunday, in order to surrender him ⁱ; for this is not by virtue of any process at all. And it should seem that process of contempt, being of a criminal nature, may be served upon that day ^k. But a rule *nisi* for an attachment, for non-payment of money pursuant to the master's *allocatur*, cannot be so served ^l.

An *arrest* when allowed, is made by the sheriff or his officers, or by the bailiff of a liberty or franchise. The sheriff's authority is derived *immediately* from the court, except, in counties-palatine, where he acts by virtue of a *mandate* from the officer to whom the writ is directed: And even there, if the writ be directed immediately to the sheriff, he is bound to execute it; and a bail bond taken on the arrest is legal ^m. The officers of the sheriff are of three kinds, first, bailiffs *in fee*, or *perpetual* bailiffs, who have, by charter or prescription, the execution of writs within the *guildable* ⁿ; secondly, *common* bailiffs, (called in the old books, bailiffs-errant, 3 East, 130.) who are usually bound with sureties in an obligation for the due execution of their office, and thence are called *bound* bailiffs ^o; thirdly, *special* bailiffs, nominated by

ⁱ 6 Mod. 251. 1 Atk. *guildable*, and how it differs
239. but see 2 Blac. Rep. from a *franchise*, see 8 Co.
1273. 125. a. Dalt. Sher. 185. and

^k 12 Mod. 348. 1 Atk. for the nature of the office of
55. Willes, 459. a bailiff *in fee*, see Dalt. Sher.

^l 8 T. R. 86.

187. Gilb. C. P. 30.

^m 6 T. R. 71.

^o 1 Blac. Com. 346.

ⁿ For an account of the

by the plaintiff or his attorney, and appointed by the sheriff *pro hac vice* ^p.

The sheriff's *warrant* ^q to any of these officers ought not to be made out, until the sheriff have the writ in his actual custody ^r: And therefore where the defendant was arrested before the officer had any warrant, and before the writ was delivered to the sheriff, the bail-bond was ordered to be delivered up to be cancelled ^s. So where the sheriff having directed a warrant to A. and all his other officers, to arrest B, A. afterwards inserted therein the name of C; it was holden that the warrant was illegal, and the arrest by C. consequently void ^t.

If the defendant reside within a liberty, the bailiff of which has the execution and return of writs, there should regularly be a *non omittas*; or if there be not, the sheriff, for having execution of the writ, should make out his *mandate*, directed to the bailiff of the liberty ^u. And if there be two liberties in a county, and the sheriff make his mandate to the bailiff of one of them, who gives him no answer, he may, upon a *non omittas*, arrest the defendant in either liberty ^v; and even if the sheriff

enter,

^p 2 Blac. Rep. 952. 4 T. R. 119.

^s 8 T. R. 187.

^t 6 T. R. 122.

^q Append. Chap. IX. § 1.

^u Gilb. C. P. 25, &c.

^r R. M. 1654. § 2. R. E. 15 Car. II. § 4. Stat. 6 Geo. P. 29.

^v 5 Co. 92. a. Gilb. C.

I. c. 21. § 53.

enter, and arrest the defendant in a liberty, without a *non omittas*, the arrest is good, though the sheriff may be liable to an action ^w.

The arrest may be made at any *time* (except on a Sunday) before, or *on* the day of the return of the writ; and at any *place* within the county, except where the defendant is privileged. But it cannot be made, between the day of the return and *quarto die post*, by original ^x. In making the arrest, the sheriff or his officer must actually seize or touch the defendant's body ^y: but it is not necessary that the officer, who has the *authority*, should be the *hand* that arrests, nor in the presence of the person arrested, nor actually in sight, nor is any exact distance prescribed: it is sufficient if he be near, and acting in the arrest ^z.

^w Gilb. C. P. 27. *Fitzpatrick v. Kelly*, 22 G. III. 5 T. R. 687. *Ni. Pri.* 585. ^y 1 Salk. 79.

^z Cowp. 65.

^x 1 Sid. 229. 2 Esp. Cas.

CHAPTER X.

*Of the BAIL-BOND, and DUTY of SHERIFFS, &c.
on the ARREST.*

WHEN the defendant is arrested, he is either let out of custody, upon giving bail to the sheriff, or an attorney's undertaking, for his appearance; or deposits in the sheriff's hands, the sum indorsed on the writ, with ten pounds in addition to answer costs, &c. or he remains in custody, or escapes, or is rescued, &c.

Bail in personal actions came in with the *capias*^a: and is either to the sheriff, for the appearance of the defendant at the return of the writ, or to abide the event of the suit: The former is called bail to the *sheriff*, or bail *below*; the latter, bail to the *action*, or when special, bail *above*. Before the statute 25 Hen. VI. c. 9. the sheriff was not obliged to bail a defendant, arrested upon mesne process, unless he sued out a writ of *mainprize*; though he might have taken bail of his own accord^b. This arbitrary power produced great extortion and oppression of the subject; to remedy which, it was enacted, by the above statute, “that “sheriffs, &c. shall let out of prison all manner “of persons arrested, or being in their custody, by

^a Gilb. C. P. 33.

Dalt. Sher. 356. And see 1

^b *Id.* 20, 21. 4 Bac. Abr. Vent. 55. 85. 2 Saund. 60. 1
461 F. N. B. 251 Plowd. 67. II. Blac. 263.

“ by force of any writ, bill, or warrant, in any ac-
“ tion personal, or by cause of indictment of tres-
“ pass, upon reasonable sureties of sufficient per-
“ sons, having sufficient within the counties where
“ such persons be so let to bail or mainprize, to
“ keep their days in such place as the said writs,
“ bills or warrants shall require; persons being in
“ their ward by condemnation, execution, *capias*
“ *utlagatum* or *excommunicatum*, surety of the peace,
“ or by special commandment of any justice, and
“ vagabonds refusing to serve according to the sta-
“ tute of labourers, only excepted.”

“ And that no sheriffs, &c. shall take, or cause
“ to be taken, any obligation, for any cause afore-
“ said, or by colour of their office, but only to
“ themselves, of any person, nor by any person,
“ which shall be in their ward by course of law,
“ but by the name of their office; and upon condi-
“ tion written, that the prisoners shall appear at the
“ day and place contained in the writ, bill, or war-
“ rant. And if any sheriffs, &c. take any obligation
“ in other form, by colour of their office, it shall be
“ void.”

This statute hath two branches, first, as to the persons to be let to bail; and, secondly, as to the form of the security. Upon the first branch of the statute, it has been determined, that the sheriff has no authority to take a bond, for the appearance of persons arrested by him, under process issuing upon

upon an indictment at the quarter sessions, for a misdemeanor; but can only take a recognisance for their appearance^c; neither can he take bail on an attachment for a contempt^d. And though the words of it seem to be confined to persons arrested, and in actual custody, yet it has been holden, that the arrest need not be stated, in an action upon the bail-bond^e; and if stated, it is not traversable^f: for it would be of mischievous consequence, if a bail-bond taken civilly, without exposing the party by an arrest, were not as effectual as if he had been actually arrested. Where the defendant is arrested, and in actual custody, it is the duty of the sheriff to take bail, if required: and therefore if a bail-bond be tendered, with sufficient surties, and the sheriff refuse to accept it, and liberate the defendant, he is liable to a special action on the case^g. The clause which requires reasonable surties, was introduced for the benefit of the sheriff;

^c 4 T. R. 505.

351. Bac. Abr. tit. *Sheriff*, O.

^d Cro. Car. 309. Com. Rep.

4 V. 263.

264. 1 Str. 479. Barnes, 64.

^e 1 Str. 643.

But he may take bail on an attachment out of Chancery, on mesne process: Sty. Rep. 212.

^f *Id.* 444. But see Noy, 43. *semb. contra.* See also Say. Rep. 116. by which it appears, that the issuing of the process may be traversed.

234. 2 Vent. 237. 2 Salk. 608.

1 Ld. Raym. 722. S. C. Com.

Rep. 264. Barnes, 64. 2 Blac.

^g Gilb. C. P. 20. Cro. Car.

Rep. 955. 3 Leon. 208. *contra.*

196. W. Jon. 226. S. C. 1 Sid.

Aliter, after a decree: Gilb.

22. 2 Mod. 31. 84. 180. 2

Rep. 84. Prec. Chan. 331.

Vent. 96. 6 T. R. 255.

S. C. and see 1 Eq. Cas. Abr.

sheriff; and therefore, though he may insist upon two sureties, yet he may take a bond with *one* only ^h. And for the same reason, the plaintiff cannot maintain an action against him, for taking sureties that are insufficient, or do not inhabit within the county ⁱ.

The second branch of the statute requires a security by *bond* ^k; respecting which, there are three things to be observed; first, that it be made to the sheriff himself; secondly, that it be made to him, by his name of office; and, thirdly, that it be conditioned for the defendant's appearance, at the return of the writ, and for that only ^l. Therefore, if the bond be not made to the sheriff ^m, or be not made to him by his name of office ^m, or if it be single without any condition at all ^m, or with an impossible condition ⁱ, or the condition be not for the defendant's appearance ^m, or be for that and something else ^m, it is void by the statute. If the objection appear on the face of the declaration, or upon *oyer*, the defendant may demur; but otherwise

^h 10 Co. 100. b. Cro. Eliz. 624. 808. 852. 862.

^k 1 T. R. 421. Append Chap. X. § 1.

ⁱ *Id.* 808. 852. 862. Noy, 39. 1 Sid. 96. 2 Saund. 59.

^l Cro. Eliz. 862. 4 Bac. Abr. 462.

1 Mod. 227. 239. 2 Mod. 83. 177. But see 1 Ld.

^m Dyer, 119. 120. 10 Co. 100. a. b.

Raym. 425. 1 Salk. 99.

ⁿ 3 Lev. 74. 1 Str. 399

S. C. 6 Mod. 122. *semb.*

Fort. 363. S. C. 2 T. R.

contra.

569.

wise he should plead it: and when, by pleading or otherwise, it appears in any part of the record, he may move in arrest of judgment °.

If the bond be substantially good, it cannot be avoided for any trifling informality, or variance of the condition from the writ, in the description of the plea, or of the time or place of appearance. Thus, where the writ was to answer the plaintiff in a plea of debt, *for three hundred and twenty pounds*, or in a plea of trespass, with an *ac-etiam*, and the condition was to answer the plaintiff in a plea of debt, or trespass, *generally*, or without mentioning the plea at all, the variances were holden to be immaterial^p; for the statute only requires a bond conditioned for the defendant's appearance, and the description of the plea is merely surplusage. And accordingly, where the sheriff, upon an original writ in a plea of trespass *on the case on promises*, took a bail bond conditioned for the defendant's appearance, to answer the plaintiff in a plea of *trespass*, the court held it to be valid^q. So where the writ, in *trespass*, was to appear before the *lord the king* at Westminster, and the condition was to appear before *justices of the King's Bench* at Westminster^r, the bond was holden good. And where the

° 2 T. R. 569.

semb. contra.

^p Cro. Jac. 236. 2 Lev.

^q 6 T. R. 702.

123. 2 Show. 51. T. Jon.

^r 2 Lev. 180. T. Jon. 46

137, 8. 6 Mod. 122. 10 Mod.

S. C. 2 Vent. 237. 8

227. But see 2 Lev. 177

the writ, by *original*, was returnable before the lord the king, *wheresoever he shall then be in England*, and the condition was without the words *wheresoever*, &c. the court gave judgment for the plaintiff, in an action upon the bond; saying, they would understand, that by appearing before the king was meant, before the king in his *court*, and not before the king in *person*^s. It has also been holden, that the statute for preventing frivolous and vexatious arrests^t is merely *directory* to the sheriff, and does not avoid the bail-bond, where there is no affidavit of the cause of action^u, or the sum sworn to is not indorsed on the writ^u, or even where the sheriff takes bail for more than the sum sworn to^v.

The provisions of the statute of Hen. VI. are not applicable to securities taken by, or for the benefit of the plaintiff^w. And hence, an attorney is bound by his undertaking to appear for the defendant, though it be not exactly in the form prescribed. By an old rule of court^x, “a prisoner taken upon a *capias* shall not be discharged, till he hath given bond to appear; unless the plaintiff or his attorney shall consent to take an appearance,

^s 2 Str. 1155, 6.

Pul. 109.

^t 12 Geo. I. c. 29.

^w Cro. Eliz. 190. 1 Sid.

^u 1 Bur. 330.

132. 1 Lev. 98. S. C.

^v 2 Wils. 69. 1 Bur. 331.

Mod. 205.

^z H. Blac. 76. 2 Bos. &

^x R. M. 1654. § 6.

“ appearance, without bail.” But it is now the common practice to take an attorney’s undertaking, where special bail is required; and the court will enforce it by attachment^y. †

If the defendant, upon being arrested, remain in custody, he is either confined in a private house, or carried to the county gaol. And to prevent persons from suffering by the oppression of inferior officers, in the execution of process for debt, it is enacted by the statute 32 Geo. II. c. 28.^z, commonly called the *Lords’ Act*, that “ no sheriff, “ under-sheriff, bailiff, serjeant at mace, or other “ officer or minister, shall convey or carry, or “ cause to be conveyed or carried, any person or “ persons by him or them arrested, or being in his “ or their custody, by virtue or colour of any “ action, writ, process, or attachment, to any ta- “ vern, alehouse, or other publick victualling or “ drinking house, or to the private house of any “ such officer or minister, or of any tenant or re- “ lation of his, without the free and voluntary “ consent of the person or persons so arrested or in “ custody; nor charge any such person or persons “ with any sum of money, for any wine, beer, “ ale, victuals, tobacco, or any other liquor or “ things whatsoever, save what he, she, or they “ shall

§ 1 T. R. 422.

z § 1.

† *From the Addenda to the London edition.* It sometimes happens, that persons arrested upon mesne process, may not be able to find sufficient sureties for their appearance at the return of the writ, and yet may be able to make a deposit of the money for which they are so arrested, together with a competent sum for costs: and therefore, by the statute 43 Geo. III. c. 46. § 2. reciting that it is expedient that persons arrested should, upon making such deposit, be permitted to go at large until the return of the writ, without finding bail to the sheriff for their appearance at the return thereof; it is enacted, that “ all per- “ sons who shall be arrested upon mesne process, within those parts “ of the united Kingdom of Great Britain and Ireland called England “ and Ireland, shall be allowed, in lieu of giving bail to the sheriff, to “ deposit in the hands of the sheriff, by delivering to him or to his un- “ der-sheriff, or other officers to be by him appointed for that purpose. “ the

“ shall call for, of his, her, or their own free ac-
 “ cord; nor shall cause or procure him, her, or
 “ them, to call or pay for any such liquor or things,
 “ except what he, she, or they shall particularly and
 “ freely ask for; nor shall demand, take, or receive,
 “ or cause to be demanded, taken, or received, di-
 “ rectly or indirectly, any other or greater sum or
 “ sums of money, than is or shall be by law allowed
 “ to be taken or demanded, for any arrest or taking,
 “ or for detaining, or waiting till the person or per-
 “ sons so arrested or in custody shall have given an
 “ appearance or bail, as the case shall require, or
 “ agreed with the person or persons at whose suit
 “ or prosecution he, she, or they shall be taken or
 “ arrested, or until he, she, or they shall be sent to
 “ the proper gaol belonging to the county, riding,
 “ division, city, town, or place where such arrest or
 “ taking shall be; nor shall exact or take any re-
 “ ward, gratuity, or money for keeping the person
 “ or persons so arrested or in custody out of gaol or
 “ prison.”

“ And that no sheriff, &c. shall carry any such
 “ person to any gaol or prison, within *four and*
 “ *twenty hours* from the time of such arrest, un-
 “ less such person or persons so arrested shall re-
 “ fuse to be carried to some safe and convenient
 “ dwelling-house, of his, her, or their own nomina-
 “ tion or appointment, within a city, borough, corpo-
 “ ration,

“ the sum indorsed upon the writ, by virtue of the affidavit for hold-
 “ ing to bail in that action, together with ten pounds in addition to
 “ such sum, to answer the costs which may accrue or be incurred in
 “ such action, up to and at the time of the return of the writ, and al-
 “ so such further sum of money, if any, as shall have been paid for the
 “ king's fine upon any original writ; and shall thereupon be dis-
 “ charged from such arrest, as to the action in which he she or they
 “ shall so deposit the sum indorsed on the writ.”

“ And that the sheriff shall, in every such case, at or before the re-
 “ turn of the said writ, pay into the court in which such writ shall
 “ be returnable, the sum of money so deposited with him as aforesaid;
 “ and

“ration, or market town, in case such person or
 “persons shall be there arrested, or within three
 “miles from the place where such arrest shall be
 “made, if the same shall be made out of any city,
 “borough, corporation, or market town, so as such
 “dwelling-house be not the house of the person
 “arrested, and be within the county, riding, divi-
 “sion, or liberty in which the person under arrest
 “was arrested; and then and in any such case, it
 “shall be lawful to and for any such sheriff, or other
 “officer or minister, to convey or carry the person
 “or persons so arrested, and refusing to be carried
 “to such safe and convenient dwelling-house as
 “aforesaid, to such gaol or prison, as he, she, or
 “they may be sent to, by virtue of the action, writ,
 “or process against him, her, or them: And that
 “no sheriff, &c. shall take or receive any other or
 “greater sum or sums, for one or more night’s
 “lodging, or for a day’s diet, or other expences of
 “any person or persons under arrest, on any writ,
 “action, attachment, or process, other than what
 “shall be allowed as reasonable in such cases, by
 “some order or orders made by justices of the
 “peace, in pursuance of the said act.”

These provisions are confined to persons arrested
 on *mesne* process; the intent of them being, that
 such persons may have an opportunity of procuring
 bail,

a § 2.

“and thereupon, in case the defendant or defendants shall afterwards
 “duly put in and perfect bail in such action, according to the course
 “and practice of such court, the sum of money so deposited and paid
 “into court as aforesaid, shall by order of the court, upon motion to
 “be made for that purpose, be repaid to such defendant or defendants:
 “but in case the defendant or defendants shall not duly put in and
 “perfect bail in such action, then and in such case the said sum of
 “money so deposited and paid into court as aforesaid shall, by order
 “of the court, upon a like motion to be made for that purpose, be paid
 “out to the plaintiff or plaintiffs in such action, who shall be there-
 “upon authorised to enter a common appearance, or file common bail
 “for such defendant or defendants, if the said plaintiff or plaintiffs
 “shall so think fit; such payment to the plaintiff or plaintiffs to be
 “made subject to such deductions, if any, from the sum of ten pounds
 “deposited

bail, or of agreeing with the plaintiffs; and it has accordingly been determined, that a sheriff's officer is not liable to the penalties of the statute, for carrying a defendant taken in *execution* to prison, within twenty-four hours after the arrest ^b. No time is limited by the above act, within which a defendant, arrested on mesne process, should be carried to the county gaol: And where, to an action for an escape on mesne process, the sheriff pleaded, that the debtor was rescued out of his custody, as he was carrying him to *Newgate*, to which the plaintiff replied, that the debtor ought to have been carried to prison within a *convenient* time after the arrest, and that he was rescued, because the defendant neglected, &c. the court thought the replication bad, and gave judgment for the defendant ^c. But it seems to be the duty of the sheriff, if possible, to carry the defendant to the county gaol, by the return of the writ on which he was arrested ^d; and that afterwards the sheriff keeps him at his peril, in case the creditor is delayed. Where the defendant, however, is arrested on the return day, he cannot be carried to the county gaol, till the expiration of twenty-four hours after the arrest ^e. And where the sheriff, having arrested a defendant on mesne process, keeps him in his custody after the return of the writ, and then carries him to prison, he is not liable to an action on the

^b 4 T. R. 555.

^d Per *Buller*, Just. 5 T. R. 41.

^c 1 Lutw. 128.

^e 5 T. R. 40.

“deposited and paid to answer the costs as aforesaid, as upon the taxation of the plaintiff's costs, as well of the suit as of his application to the court in that behalf, may be found reasonable.”

The cases in which the plaintiff may think fit to enter a common appearance, or file common bail for the defendant, are where he claims and means to proceed for more than the sum indorsed on the writ: but in these cases, there is no provision made by the act, with regard to costs, if he should not eventually recover more than that sum, nor for his refunding any part of it, if he should recover less.

the case, as for an escape, if the jury find that the plaintiff has not been delayed, or prejudiced in his suit^f.

For the further protection of persons arrested, against the *oppression* of inferior officers, and the *exaction* of gaolers, to whose custody they may be committed, it is by the same statute^g enacted, that
 “ every sheriff, under-sheriff, bailiff of any liberty,
 “ gaoler and keeper of any prison or gaol, and other
 “ person and persons, by whom, or to whose custody
 “ or keeping, any one shall be arrested, taken, com-
 “ mitted, or charged in execution, by virtue of any
 “ writ, process, or action, or attachment, shall at all
 “ times permit and suffer every such person and per-
 “ sons, during his, her, and their respective con-
 “ tinuance under arrest, or in custody, or in execu-
 “ tion for any debt, damages, costs, or contempt,
 “ at his, her, and their free will and pleasure, to
 “ send for, or have brought to him, her, or them,
 “ at seasonable times in the day-time, any beer,
 “ ale, victuals, or other necessary food, from what
 “ place he, she, or they shall think fit, or can
 “ have the same; and also to have and use such
 “ bedding, linen, or other necessary things, as
 “ he, she, or they shall have occasion for, and
 “ think fit, or shall be supplied with, during his,
 “ her, or their continuance under any such arrest
 “ or

“ or commitment, without purloining or detaining
 “ the same, or any part thereof, or inforcing or re-
 “ quiring him, her, or them to pay for the having or
 “ using thereof, or putting any manner of restraint
 “ or difficulty upon him, her, or them, in the using
 “ thereof, or relating thereto; and no such prisoner
 “ or prisoners shall pay any thing in respect thereof,
 “ to any such sheriff, &c.: And that no gaoler or
 “ keeper of any gaol or prison, or other person
 “ thereto belonging, shall demand, take, or receive,
 “ directly or indirectly, of any prisoner or prisoners
 “ for debt, damages, costs, or contempt, any other
 “ or greater fee or fees whatsoever, for his, her, or
 “ their commitment, or coming into gaol, chamber-
 “ rent there, release or discharge, than what shall be
 “ mentioned or allowed in the list or table of fees,
 “ settled, inrolled, and registered according to the
 “ directions of the said act ^h.”

And for the more speedy punishing gaolers,
 bailiffs, and others employed in the execution of
 process, for *extortion*, or other abuses in their re-
 spective offices and places, it is further enacted,
 “ that upon the petition, in *term*-time, of any pri-
 “ soner or person being, or having been under ar-
 “ rest or in custody, complaining of any exaction
 “ or extortion by any gaoler, bailiff, or other of-
 “ ficer or person, in or employed in the keeping
 “ or

^h § 12. and see 1 Esp. Cas. *Ni. Pri.* 361.

“ or taking care of any gaol or prison, or other
“ place, where any such prisoner or person under,
“ or having been under, arrest or in custody, by any
“ process or action, is or shall have been carried, or
“ in respect of the arresting or apprehending any
“ person or persons, by virtue of any process, ac-
“ tion, or warrant, or of any other abuse whatsoever,
“ committed or done in their respective offices or
“ places, unto any of his majesty’s courts of record
“ at *Westminster*, from whence the process issuedⁱ,
“ by which any person who shall so petition was
“ arrested, or under whose power or jurisdiction
“ any such gaol, prison, or place is; or in *vacation*
“ time, to any judge of any such courts at *West-*
“ *minster*, from whence any such process so issued;
“ or to the judges of assize, &c.; every such court,
“ judges of assize, &c. are by the said act authorised
“ and required to hear and determine the same, in
“ a summary way, and to make such order there-
“ upon, for redressing the abuses which shall by
“ any such petition be complained of, and for pu-
“ nishing such officer or person complained against,
“ and for making reparation to the party or parties
“ injured, as they shall think just, together with the
“ costs of every such complaint; and all orders and
“ determinations which shall be thereupon made, by
“ any of the said courts, &c. shall have the same
“ effect,

“ effect, force, and virtue, as other orders of the
 “ same courts, &c., and obedience thereto may be
 “ enforced in like manner, by attachment or other-
 “ wise ^k. ”

“ And that every sheriff, under-sheriff, bailiff of
 “ any liberty, bailiff, serjeant at mace, gaoler, and
 “ other officer and person as aforesaid, who shall in
 “ anywise offend against the said act, shall, for every
 “ such offence, (over and above such other penalties
 “ or punishments as he may be liable unto,) forfeit
 “ and pay to the party thereby aggrieved, the sum of
 “ *fifty* pounds, to be recovered, with *treble* costs of
 “ suit, by action of debt, bill, plaint, or information,
 “ in any of his majesty’s courts of record at *West-*
 “ *minster* ^l. ” “ But an action will not lie against the
 sheriff, where more than the sum allowed has been
 taken for a bail-bond, by one of his officers, to
 whom the warrant was not directed, but to whose
 lock-up house the defendant was brought after be-
 ing arrested.” 4 Esp. Cas. *Ni. Pri.* 63.

Where the sheriff, having arrested the defen-
 dant, suffers him to go at large, upon giving bail
 for his appearance at the return of the writ, he is
 not liable to an action of *escape*; for he was obliged
 by the statute to take bail ^m. And even where he
 suffers him to go at large without bail, he is not,
 it seems, liable to an action, provided he have him
 at the return of the writ ⁿ. But if he have him not
 then,

^k § 11.

^l § 12.

^m Cro. Eliz. 624, 852. Noy,
 39. S. C. 1 Sid. 23. 1 Vent.

55. 3 Salk. 314, 15. Gilb. C
 P. 22.

ⁿ 2 T. R. 172. 2 Bos. &
 Pub. 15.

then, or afterwards suffer him to go at large, without lawful authority, he is, in either case, liable to an action ^o. And where an action is brought against the sheriff, after he has taken bail, he must plead the statute; and cannot take advantage of it, on demurrer to the declaration, or in arrest of judgment ^p. An action against the sheriff for an escape, may it seems be defeated, by putting in bail in the original action, of the term in which the writ was returnable, though after the expiration of the time allowed for putting it in; and even after the action for an escape is brought ^q. To prevent this, the plaintiff should oppose the justification of bail, if put in: and in a late case ^r, where bail had been permitted to justify without opposition, the court set aside the rule for the allowance of bail, on payment of the costs of justification.

Where the defendant is *rescued* upon mesne process, as he is going to prison, the sheriff may return the rescue ^s; but not, where the defendant is rescued, after he is put in prison, except by the king's enemies ^t. Upon the sheriff's return of a *rescue*,
the

^o Noy, 39. 1 Mod. 228, 9. 2 ^r *Bosanquet v. Simpson*, E. Mod. 178. S. C. Gilb. C. P. 42 G. III.

22. 2 T. R. 174, &c.

^s Cro. Jac. 419. 3 Bulst.

^p Cro. Eliz. 460. Moor, 198. 1 Rol. Rep. 388. 440. S. 428. S. C. 1 Sid. 22. 439. 1 C. 3 Lev. 46. 1 Str. 435. Gilb. Vent. 85. 1 Mod. 33. 57. S. C. P. 23. but see Cro. Eliz. C. 2 Saund. 154, 5. 868. Moor, 852. *contra*.

^q 1 Esp. Cas. *Ni. Pri.* 87. ^t Cro. Jac. 419. 1 Rol. Rep. 2 Bos. & Pul. 55. 246. 441. 1 Str. 435. 5 Bur. 2814.

the plaintiff has a triple remedy against the rescuers; by attachment, action on the case, or indictment ^u. The return of a rescue is of itself a conviction ^v; and the court will grant an *attachment* upon it, in the first instance ^w, which should be made returnable at a *general* return, though the original process was at a day *certain* ^x. But without the sheriff's return, the court will not grant an attachment, upon a mere affidavit of the fact ^y. It was formerly the constant course, upon the return of a rescue, to set a certain fine of four nobles on each offender ^z: but of late years, the courts have fined according to their discretion, upon considering the circumstances of the case ^a. And as the sheriff's return of a rescue is not traversable, the court will proceed to punish the rescuers, without going through the ordinary course of examining them upon interrogatories ^b. But where a defendant was brought up on an attachment, for rescuing a person arrested on a warrant for obstructing excise officers, it was said to be the invariable practice of the court, in such a case, to put the defendant to answer interrogatories, though he did not deny the charge in the affidavits, unless the prosecutor waived putting them ^c.

^u Com. Dig. tit. *Rescous*, D. 1 Str. 531.

^v Cas. temp. Hardw. 112.

^z T. Jon. 198. 2 Salk. 586.

^w 2 Salk. 586. Say. Rep.

^a 1 Str. 642.

121. 4 Bur. 2129.

^b 4 Bur. 2129. but see 2

^x 1 Str. 624.

Salk. 586.

^y 2 Salk. 586. 6 Mod. 141.

^c 5 T. R. 362.

CHAPTER XI.

Of APPEARANCE and BAIL to the ACTION.

HERETOFORE, when a writ issued out of this court, it was entered upon a roll; so that though the officer had not returned the writ, yet the defendant might have appeared at the day given by the roll; and that either to save himself from corporal pain, by imprisonment, or to prevent the loss of issues, or to save his freehold or inheritance ^a.

Appearance is the first act of the *defendant* in court ^b; and differs from putting in *bail*, which is the act of the court itself ^c, as is evident from the language of the bail-piece, wherein the defendant is stated to be *delivered* to bail ^d, &c. And it is either *voluntary* or *compulsive*. A *voluntary* appearance is of no effect, unless the plaintiff's attorney within fourteen days after such appearance, sue out a writ of *latitat*, or bill of Middlesex, where the defendant abides in that county ^e.

In actions by *original*, the appearance is entered with the *flacer* of the county where the action is brought ^f; and upon a summons, attachment, or *distringas*,

^a Co. Lit. 135. a. 1 Salk. 64.

^d 1 Atk. 239.

^b Com. Dig. tit. *Pleader*,
B. 1.

^e R. T. 4 W. & M. reg. 1.

^c 1 Salk. 8.

^f Trye, *in pref.* and see Append. Chap. XI. § 1, 2.

distringas, it should be entered on or before the *quarto die post* of the return of the writ ^g. Upon a *capias*, or other process against the person, it is *common or special*; and answers to *common* or *special* bail, which will next be considered.

Common bail must be filed in all actions by *bill*, where special bail are not necessary, or have been dispensed with by the court; and they are particularly required in *ejectment*, for the casual ejector ^h, and to authorise judgments by warrant of attorney, default, or *non sum informatus* ⁱ. These bail are merely *nominal*. *Special* bail, or bail above, are two or more ^j *real* and responsible persons, who undertake generally, or in a sum certain, that if the defendant be convicted, he shall satisfy the plaintiff, or render himself to the custody of the marshal.

Before the making of the statute 12 Geo. I. c. 29. the defendant being always arrested upon process against his person, it was discretionary in the court, to discharge him upon common, or hold him to special bail ^k. Anciently if the cause of action were for a sum under *twenty* pounds, or for uncertain damages ^l, the court let the defendant out of custody upon *common* bail; but if it were for a sum certain above twenty pounds, they
made

^g Trye, 67, 8.

^j Lofft, 252.

^h R. T. 14 Car. II. R. M. 53 Car. II.

^k R. M. 1654. § 9. Gilb. K. B. 309. 2 Keb. 101.

ⁱ R. H. 1 W. & M. R. T. 4 W. & M. II.

^l Gilb. C. P. 36, 7.

made him find *special* bail ^m: Afterwards, the sum was reduced to *ten* pounds ⁿ: And now, by the last-mentioned statute, “no person shall be holden to “special bail, upon any process issuing out of a *superior* court; nor, by 19 G. III. c. 70. upon any “process issuing out of an *inferior* court; where “the cause of action shall not amount to the sum “of *ten* pounds or upwards.” Since the making of these statutes, special or common bail is no longer discretionary in the court, but is governed by the *arrest*; it being a general rule, that wherever the defendant may be arrested, he may be holden to special bail; and *é converso*, that wherever the defendant cannot be arrested, common bail is sufficient.

Common bail may be filed, or a common appearance entered, by the defendant or his attorney, or by the plaintiff according to the statute ^o. Where the defendant has been served with the copy of a bill of Middlesex, or other process thereon, he should file common bail at the return of it, or within *eight* days after such return ^p; which are reckoned

^m Gilb. C. P. 35.

ⁿ *Id.* 36.

^o 12 Geo. I. c. 29. and for the origin of common bail, see Gilb. K. B. 309.

^p Stat. 5 Geo. II. c. 27. § 1. This is the same time as was allowed to file common bail, upon an arrest, before the statute 12 Geo. I. c. 29. And if the defendant did not file

it within that time, he was liable to the penalty of five pounds, to be paid to the plaintiff. Stat. 5 W. & M. c. 21. § 3. 9 & 10 W. III. c. 25. § 33. 5 Mod. 392. 1 Cl. Inst. 57. The rule for payment of this penalty was absolute in the first instance; the words of the statutes being, that the court shall *immediately* award judgment.

reckoned exclusively: and Sunday is not accounted as one of them^a. These bail are *entered* on a piece of stamped parchment, called a bail-piece^r, which is filed with the clerk of the common bails; who, by a late rule^s, is to mark the bail-pieces *numerically*, as they are received. The defendant, having been served with a copy of a *capias*, or other process by *original*, should enter a common appearance with the *filacer*, in the same number of days as he is allowed to file common bail^t; reckoning them from the *essoin-day*, and not from the *quarto die post* of the return of the process.

Where an *attorney* of either bench has accepted a warrant, or subscribed a process, declaration, or warrant to appear, the rule is, that “he shall be “compelled to cause an appearance, or liable to “an attachment, or put out of the roll, as the “case requires; and the party is not to be received to countermand such appearance, after “his retainer^u.” The usual mode of proceeding upon this rule is by attachment^v; and if an attorney undertake to appear, the court will oblige him to do it in a proper manner: therefore, if he undertake

judgment, whereupon the plaintiff may take out execution. 2 Str. 737. Gilb. K. B. 369.

^a 1 Bur. 56.

^r Append. Chap. XI. § 3.

^s R. E. 30 G. III. 3 T. R.

560.

^t Stat. 5 G. II. c. 27. § 1.

^u R. M. 1654. § 10. and see Loft, 192, 3. by which it appears that the undertaking must be *signed*.

^v 6 Mod. 42. 86.

^w 1 Str. 114. 445.

take to appear for an *infant*, he must appear by *guardian* ^w. And though he may have been imposed upon by the sheriff's officer, yet the court will oblige him to fulfil his undertaking ^x.

Before the statute 12 Geo. I. c. 29. common bail could only have been filed, or a common appearance entered, by the defendant or his attorney. But now, by that statute, as altered by the 5 G. II. c. 27. "if the defendant, having been
 " served with process, shall not appear at the re-
 " turn thereof, or within eight days after such re-
 " turn, the plaintiff, upon *affidavit* of the service
 " of such process ^y, made before a judge, or com-
 " missioner of the court for taking affidavits, or
 " before the proper officer for entering common
 " appearances, or his deputy, (and which af-
 " fidavit shall be filed *gratis*,) may enter a com-
 " mon appearance, or file common bail, for the
 " defendant; and proceed thereon, as if such de-
 " fendant had entered his appearance, or filed
 " common bail." Upon these statutes it has been holden, that common bail should be filed by the plaintiff for the defendant, of the term in which the writ is returnable ^z; or as of that term, in the following one, *nunc pro tunc*: But it cannot be filed by the plaintiff, in a third or other subsequent term ^a; though if judgment has been ir-
 regularly

^w 1 Str. 693.

2 T. R. 719, 20.

^y Append. Chap. XI. § 4.

^z *Id. ibid.*

^a Cas. temp. Hardw. 138.

regularly signed, without filing common bail for the defendant, according to the statute, till after the term succeeding that in which the writ was returnable, and after the judgment itself has been entered up, yet the defendant, having given a *cognovit*, is estopped from objecting to the irregularity, if the plaintiff has filed common bail *nunc pro tunc*, before the time of making the objection^b.

For preventing inconveniencies which happened to plaintiffs, by the defendants omitting to file common bail, according to the ancient usage and course of the court, there is an old rule, that "all clerks, &c. do within ten days after the end of every term, deliver to the secondary, a note of all such appearances, as have been made unto them the term before, and by whom they were made, so that the person appointed to enter the bails, may see whether they are filed for every such appearance or not^c." And for the better distinguishing by whom common bail shall have been filed, it is ordered, that "in all cases where common bail shall be filed by the plaintiff for the defendant, by virtue of the act, these words shall be written on the bail-piece, *viz.* 'filed according to the statute,' or words to the like effect^d." And where the plaintiff files common

^b 2 T. R. 206.

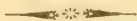
1027. Cas. temp. Hardw.

^c R. E. 1657. reg. 2.

207. S. C.

^d R. M. 10 G. II. 2 Str.

mon bail for the defendant, on any day between the second and sixth of November, and he is in other respects entitled to sign judgment, it is signed as on the day preceding the *essoins*-day of Michaelmas term ^e. The plaintiff's attorney may enter a common appearance, or file common bail for the defendant, according to the statute, without entering or filing of record any *memorandum* or minute of the defendant's warrant, pursuant to the 25 Geo. III. c. 80. ^f: But the defendant's attorney must not plead, or carry on any further proceedings in the action, until such *memorandum* or minute shall have been delivered to the proper officer, to be entered or filed of record, according to the directions of the act ^g.



Where the defendant has been arrested, and discharged out of custody, upon giving bail to the sheriff, for his appearance at the return of the writ, he should regularly appear, if not surrendered ^h, and put in and perfect *special* bail to the action, or bail *above*; so called, in contradistinction to the sheriff's bail, or bail *below*. Special bail may also be put in by the defendant's attorney, in

^e 5 T. R. 65.

^h 6 T. R. 755. 7 T. R.

^f See the statute, § 22.

192.

^g *Id.* § 23.

in pursuance of his undertaking; or by the sheriffⁱ or his bail^k, for their own indemnity.

Bail above may be put in before^l, or after the return of the writ. If not put in before, and the defendant be arrested in London or Middlesex, special bail should be put in within *four* days; or, if in any other county, within *six* days, exclusive, after the return of the process^m, or *quarto die post* by originalⁿ. And if either the fourth or sixth day fall on a *Sunday*, the defendant has all the *Monday* following to put in bail^o. But bail above may be put in on a *dies non juridicus*, as on the second of February, which is considered as a day for such business as is transacted at the judge's chambers^p.

Before the statute 4 W. & M. c. 4. § 1. special bail could only have been put in before a judge in town. But this practice being found productive of great expence and inconvenience, it was enacted, by the above statute, that “ the chief
“ justice, and other the justices of the court of
“ king's bench for the time being, or any two of
“ them, whereof the chief justice for the time
“ being to be one, shall or may, by one or more
“ commission

ⁱ Peake's Cas. *Ni. Pri.* 169.

ⁿ 4 T. R. 377.

^k 2 Str. 876.

^o R. M. 8 Ann. 1. (b). 2

^l 8 T. R. 456.

Str. 702. 914.

^m R. M. 8 Ann. I. Former

^p 5 T. R. 170.

rule, E. 11 W. III. reg. 2.

“ commission or commissions, under the seal of the
“ said court, from time to time, as need shall re-
“ quire, empower such and so many persons, other
“ than common attornies and solicitors, as they shall
“ think fit and necessary, in all and every the sever-
“ ral shires and counties within the kingdom of
“ England, dominion of Wales, and town of Ber-
“ wick upon Tweed, to take and receive all and
“ every such recognisance or recognisances of bail
“ or bails, as any person or persons shall be willing
“ or desirous to acknowledge or make before any of
“ the persons so empowered, in any action or suit
“ depending in the said court, in such manner and
“ form, and by such recognisance or bail-piece, as
“ the justices of the said court have used to take
“ the same: which said recognisance or recogni-
“ sances of bail or bail-piece, so taken as aforesaid,
“ shall be transmitted to some or one of the justices
“ of the said court; who, upon affidavit made of the
“ due taking of the recognisance of such bail or bail-
“ piece, by some credible person present at the
“ taking thereof, shall receive the same, upon pay-
“ ment of the usual fees: which recognisance of
“ bail or bail-piece, so taken and transmitted, shall
“ be of the like effect, as if the same were taken *de*
“ *bene esse*, before any of the said justices.”

By the same statute^a, “ the justices of the said
“ court

“ court shall make such rules and orders, for the justifying of such bails, and making of the same absolute, as to them shall seem meet; so as the cognizor or cognizors of such bail or bails be not compelled to appear in person in the said court, to justify him or themselves; but the same may, and is thereby directed to be determined by affidavit or affidavits, duly taken before the said commissioners, who are thereby empowered and required to take the same, and also to examine the sureties upon oath, touching the value of their respective estates; unless the cognizor or cognizors of such bail do live within the cities of London and Westminster, or within ten miles thereof. And any judge of assize, in his circuit, shall and may take and receive all and every such recognisance and recognisances of bail or bails, as any person shall be willing and desirous to make and acknowledge before him; which being transmitted in like manner, shall, without oath, be received in manner as aforesaid, upon payment of the usual fees^r. ”

Since the making of the above statute, special bail may be put in before a judge in town, a commissioner in the country, or a judge of assize in his circuit. Before a judge in town, they are put in at his chambers; and in actions by *bill*, their recog-

recognisance is taken on a *bail-piece*^s, made out by the defendant's attorney; stating the term, the *county* into which the writ issued^t, and the names of the parties, together with the names and additions of the bail, and the sum sworn to. In actions by *original*, special bail are put in before a judge in town, with the *flacer* or his clerk, in the county where the action is laid, and into which the *capias* issued^u; the defendant's attorney first making out and delivering to him a *note* in writing, answering to the *bail-piece* by bill^v. The recognisance of bail by *bill* is general^w, that if the defendant be condemned in the action, he shall satisfy the costs and condemnation money, or render himself to the custody of the marshal; or that the bail will pay the costs and condemnation money for him^x:

And the bail-piece is left at the judge's chambers, until the bail are perfected. By *original*, the recognisance is taken in a penalty or sum certain, being double the amount of the sum sworn to^y: Before a *commissioner* in the country, a bail-piece is made out, whether the action be by *bill* or *original*, and the recognisance taken thereon, in the same manner as in town, where the action is by *bill*:

^s Append. Chap. XI. § 5.

^t 7 T. R. 96.

^u 1 East, 603. 2 Bos. & Pul.
316.

^v Trye, 67, 8. Append.
Chap. XI. § 6.

^w 2 Bulst. 232. Cro. Jac.
449. 645. Cro. Car. 481. 2
Salk. 564.

^x Append. Chap. XI. § 7.

^y Trye, 121, 2. and see 1
Bos. & Pul. 530.

bill^z: and an *affidavit* of the due taking thereof should be made, either before the judge to whom the bail-piece is transmitted, or before a commissioner for taking affidavits^a. In general, it is made before a commissioner, and annexed to the bail-piece^b: But no such affidavit is necessary upon the transmission, where the bail is taken by a judge of assize in his circuit. The rule of court requires the bail-piece to be transmitted to the chief justice, or other judge of the court, in *eight* days, if taken within forty miles of London or Westminster, or, if taken above forty miles from London or Westminster, in *fifteen* days, after the taking thereof; unless all the judges are on their circuits, and then as soon as any one of them is returned^c. But it is said, that notwithstanding this rule, the bail-piece must actually be filed with one of the judges, on the *sixth* day after the return of the writ, or the bail-bond may be assigned^d. And where the action is by *original*, the bail-piece being transmitted and allowed by the judge, should be filed with the *filacer* of the county where the action is laid^e.

Special bail are absolute, or *de bene esse*^f. They cannot

^z R. T. 8 W. III. Reg. 3. § 1.

^a *Id.* § 2. and see Append. Chap. XI. § 8.

^b R. T. 8 W. III. Reg. 3. § 2. (a).

^c *Id.* § 3.

^d Imp. K. B. 123.

^e 1 East, 603. Imp. K. B. 438. 1 Crompt. 54.

^f The origin of bail *de bene esse* is thus related by Glyn,

cannot be taken *absolutely*, without the consent of the plaintiff, or his attorney^g: and when they are taken *de bene esse*, the defendant's attorney should give notice thereof in writing, without delay, to the plaintiff's attorney^h. The *notice* of bail in town is, that they are put inⁱ; or, if taken before a commissioner, that the bail-piece is *filed*^k, with an affidavit of the due taking thereof, at a judge's chambers. The notice, in either case, should be properly *entitled*^l; and, where it is of bail put in, should set forth, with truth and certainty, their names^m, degreesⁿ or mysteries^o, and places of abode^p, in order that the plaintiff may have an opportunity of

Glyn, Ch. J. "A bishop, says he, having arrested a man for a large debt, he tendered bail to justice *Richardson*, who took it in his chamber: and the bail being insufficient, the bishop represented the matter to parliament, and prayed their remedy for it: upon which it was enacted, that no bail, taken before a judge in his chamber, should bind the plaintiff, without his assent thereto, or the confirmation of such bail, taken by all the court." 2 Sid. 91.

^g R. M. 1654. § 7, 8.

^h R. M. 16 Car. II. Formerly, the defendant's attor-

ney was required to give notice of bail in this court, to the plaintiff's attorney, before it was put in; R. M. 7 Jac. I. and the plaintiff's attorney, on such notice being given to him, was obliged to attend before a judge, to accept of or except to the bail. R. M. 21 Car. I. In the common pleas, notice of bail is unnecessary, if it be put in in time.

ⁱ Append. Chap. XI. § 9.

^k *Id.* § 10.

^l Lofft, 237.

^m *Id.* 187.

ⁿ *Id.* 281.

^o *Id.* 187.

^p 1 Bos. & Pul. 325. 335

of inquiring after them^q. And the *parish*^r or town^s wherein they live, without the *street*, or other certain place of their residence, is too vague a description. If the bail above are the same persons as were bail to the sheriff, it is usually so expressed in the notice.

The plaintiff or his attorney, upon being served with this notice, either accepts of, or excepts to, the bail. If he *accept* of them, the defendant's attorney should cause the bail-piece to be filed, with the master, within *twenty* days after such acceptance^t: But if he be not satisfied with the bail, he may *except* to them, and thereby compel a justification. If the bail to the sheriff become bail above, the plaintiff is not at liberty to except to them, after he has taken an assignment of the bail-bond^u: for by so doing, he has admitted them to be sufficient. And the delivery of a declaration *in chief* before special bail put in, is holden to be a waiver of the bail; and before justification, it is an acceptance of them^v. The plaintiff, however, may declare *de bene esse*, or conditionally, provided good bail be put in, or the bail already put in

^q 6 Mod. 24.

^r Lofft, 72. 194.

^s *Per Cur.* M. 25 G. III.

^t R. T. 13 Car. II. For-
mer rule, H. 23 Car. I.

^u 1 Salk, 97. 7 Mod. 62.

117. 6 Mod. 122. R. M.

8 Ann. Reg. 1. (c). R. E. 5

G. II. Reg. 1. (a).

^v R. M. 8 Ann. Reg. 1.

(c). R. E. 5 G. II. Reg. 1

(a).

in do justify ^w: Though the demand or acceptance of a plea will, even then, be deemed a waiver of the bail, or justification ^x.

The exception to bail should be entered in the bail-book at the judge's chambers by *bill* ^y, or in the *filacer's* book by *original* ^z, within twenty days after notice of bail put in or filed ^a, and not afterwards ^b. If it be not entered within that time, then, "upon affidavit in writing of such notice ^c,
" on the back of the bail-piece, for which affidavit
" no fee shall be taken, the bail shall be filed by
" the defendant's attorney, within four days next
" after the end of the twenty days ^d." The exception being entered, *notice* thereof should be given in writing, without delay, to the defendant's attorney ^e: and "if the notice be given in
" term-time, the defendant shall procure his bail
" to justify in four days *exclusive* after such notice;
" or shall add other bail, who shall justify within
" the said four days; but if such exception be
" entered in vacation, and notice thereof given in
" like

^w R. M. 8 Ann. Reg. 1. 406, 7.

(c).

^b R. M. 8 Ann. Reg. 2.

^x Barnes, 92.

^c Append. Chap. XI. § 11.

^y R. M. 8 Ann. Reg. 2.

^d R. M. 16 Car. II.

(a). and see Append. Chap. XI. § 12.

^e R. M. 8 Ann. Reg. 2.

^z R. E. 2 Geo. II.

(a). R. E. 2 G. II. R. E. 5 G. II. Reg. 1. 7 T. R. 26.

^a R. M. 16 Car. II. R. T. 3 W. III. Reg. 3. § 5. 1 Salk.

and see Append. Chap. XI. § 17

98 6 Mod. 24. 2 East.

“like manner, the bail put in, or other additional
 “bail, shall justify upon the first day of the subse-
 “quent term ^f.”

Where the bail already put in do not mean to justify, others should be *added*, before a judge, on the bail-piece by *bill*, or in the filacer's book by *original*, within the time allowed for their justification: and if there be not time enough, the defendant's attorney may take out a summons, and obtain an order for further time ^g. When other bail were added, the court will order the names of those who were excepted to, and did not justify, to be struck out of the bail-piece ^h: But until this be done, they are liable to be proceeded against ⁱ: And if it be not done, until after proceedings have been had against them, they must pay the costs of such proceedings ^k. On an exception to bail, if notice be given of other bail, only one of whom justifies, and the names of the former still remain on the bail-piece, the first-bail may surrender the principal ^l.

Previous to the justification of bail, there should be a *notice*, setting forth that the bail already put in will, on a certain day, justify themselves in open court;

^f R. E. 5 Geo. II. *Reg.* 1.

ⁱ Say. Rep. 308, 9.

^g 1 Crompt. 64, 5. 88, &c.

^k 1 Blac. Rep. 462. 4 Bur.

^h Say. Rep. 58. 1 Wils. 2107.

337. S. C.

^l 5 T. R. 633.

court^m; or that one or more bail will be added, and justify themselves as good bail for the defendantⁿ: And if the bail were put in before a commissioner, the notice should express that they will justify themselves by affidavit^o. Notice of justification by *three* bail has been holden good^p; but notice that A. B. and C. or *two* of them will justify, is irregular^p. Where the bail already put in intend to justify, *one* day's previous notice of justification, or notice for the next day, is deemed sufficient^q; unless Sunday intervene, and then notice must be given on Saturday for Monday. But where other bail are added to those already put in, there must be *two* days' previous notice of justification, one inclusive and the other exclusive, as Monday for Wednesday, &c.^r. And Sunday is not reckoned a day for this purpose: therefore notice of added bail on Saturday for Monday is not sufficient^s.

The justification of bail is either in *person* or by *affidavit*. Where the bail are put in before a judge in town, whether by bill or original, they must

^m Append. Chap. XI. § 14.

ⁿ *Id.* § 15, 16.

^o *Id.* § 14.

^p Loft, 26.

^q *Wright v. Ley*, H. 15 G. III. K. B. In the Common pleas, *two* days notice of justification must be given, as

well where the bail already put in intend to justify, as in the case of added bail. Barnes. 82. 503.

^r Imp. K. B. 119. *Per Cur.* M. 21 G. III.

^s Case of *Overton's* bail, M. 26 G. III. Imp. K. B. 125, 6.

must *personally* appear in court; or, by consent^t before a *judge* at his chambers: and, in order to justify themselves, must swear that they are housekeepers, or freeholders, and respectively worth double the sum sworn to, after all their debts are paid, or exclusive of all debts or demands, due from them to any person or persons whatsoever^u. Bail put in before a commissioner must justify themselves in the same manner, where they live in *London* or *Westminster*, or within ten miles thereof^v: But where they live at a greater distance, they may be justified, without their personal attendance, by *affidavit*, duly taken before the commissioner, of their being housekeepers, &c.^w. This affidavit is usually annexed to the bail-piece, and a copy of it delivered to the plaintiff's attorney, at the time of giving him notice of the bail-piece being filed; after which, if an exception be entered, which seldom

^t 6 Mod. 24. R. E. 5 G. II. Reg. 1. (b).

^u R. T. 8 W. III. Reg. 3. § 5. (c). R. E. 5 Geo. II. Reg. 1. (b).

^v Stat. 4 & 5 W. & M. c. 4. § 2.

^w *Id. Ibid.* R. T. 8 W. III. Reg. 3. § 5. R. E. 5 Geo. II. Reg. 1. (b). and see Append. Chap. XI. § 17. In justifying bail by affidavit, in the Common pleas, where the same persons are bail in more

actions than one, the affidavit ought to state that they are worth double the amount of the debts, in all the actions wherein they offer to become bail. 3 Bos. & Pul. 39. But it is otherwise in the King's Bench; for there it is sufficient to swear in each action, to double the amount of the debt in that action. *Per Grose*, J. after referring to the master, M. 42 G. III.

dom happens, the affidavit must be produced, and read in court, as a justification, upon notice given thereof, and an affidavit of the service of such notice ^x.

When the bail are to be justified in court; an *affidavit* must be made of the service of notice of justification ^y, and delivered to counsel, with instructions for him to move to justify them. And the judge's clerk attending with the bail-piece, or the *filacer* with his bail-book, they are allowed to justify, as a matter of course; unless they are *opposed* by counsel *vivâ voce*, or, if taken before a commissioner, upon cross affidavits ^z. For the purpose of taking the justification of bail, &c. one of the judges of the court sits during term-time, every morning at half past nine o'clock; and no bail is permitted to justify after ten o'clock ^a.

The following are among the various grounds of opposing bail: *first*, that there is some defect in the *form*, or irregularity in the *service*, of the notice of bail or justification ^b. *Secondly*, that they have assumed names that are either *feigned*, or belong to other persons. If they assume *feigned* names, the court will order them, and the attorney, to be set on the pillory ^c. And "if any person
" shall

^x Imp. K. B. 124, 5.

a former rule of E. 28 G. III

^y Append. Chap. XI. § 13.

^b *Inte*, 222, 3. 225, 6.

^z *Id.* § 19.

^c 1 Str. 384

R. T. 35 G. III. and see

“shall acknowledge, or procure to be acknowledged, any recognisance or bail, in the name of another person, not privy or consenting to the same^d; or, before a commissioner, shall represent or *personate* another person, whereby he may be liable to the payment of any debt or damages^e; he shall, on conviction, suffer death as a felon, without benefit of clergy.” But the court will not vacate the proceedings against the party personated, until the offender be convicted^f; nor can a conviction take place, until the bail-piece be filed^g.

A *third* ground of opposing bail is, that they are not *housekeepers*: If they be, the rent of their houses is immaterial, though under ten pounds^h; nor is it necessary that they should have been assessed to the poor's rateⁱ. *Fourthly*, they may be opposed on the ground of their not being worth double the sum sworn to, after payment of all their debts. Upon this ground, *bankrupts* may be objected to, who have not obtained their certificates; or such as have been twice bankrupts, and not paid fifteen shillings in the pound^k. And bail have been rejected, who did not know the defendant;

^d Stat. 21 Jac. I. c. 26. § 2.

^g 2 Sid. 90.

^e Stat. 4 & 5 W. & M. c.

^h Lofft, 148.

4. § 4.

ⁱ *Id.* 328.

^f T. Jon. 64. 1 Vent. 301.

^k *Mountain v. Wilkins*, M

3 Keb. 694. 1 Ld. Raym. 445. 21 G. III.

dant¹; or had been bail before, but did not know in how many actions, or for what sums^m: But it seems, that the circumstance of not knowing the defendant, being only a mark of suspicion, may be explained away. *Fifthly*, *foreigners* are not admitted to be bail, merely in respect of property *abroad*, which is not liable to the process of this courtⁿ: Though it has been said, that merely having no property in *England* is not of itself a sufficient objection, without other auxiliary circumstances^o. And a person was admitted to be bail, in respect of mortgage money secured on an estate in *Ireland*^p. *Sixthly*, it is a general rule, that “no *attorney* of this or any other court shall be bail, in any action or suit depending in this court^q:” This rule, which was calculated for the benefit of attornies, has been extended to their *clerks*^r. And it is also a rule, founded on principles of prudent jealousy, that “no sheriff’s officer, bailiff, or other person concerned in the execution of process, be permitted to be bail, in any action or suit depending in this court^s:” This latter

¹ *Per Cur.* M. 26 G. III.

^m Lofft, 72. 194.

ⁿ 4 Bur. 2526, 7. Lofft, 34. 147.

^o 1 Blac. Rep. 444. and see 2 Blac. Rep. 1323, 4.

^p *Per Cur.* M. 42 G. III.

^q R. M. 1654. § 1. R. M. 14 G. II. Reg. 1.

^r Cowp. 848. Doug. 466.

2 East, 182. and see 1 H. Blac. 76. 2 H. Blac. 350. 1

Bos. & Pul. 356. 2 Bos. & Pul. 49. 564.

^s R. M. 14 G. II. Reg. 2.

2 Str. 890. 1 Barnard. 1 K. B. 417. Lofft, 153. 2 Blac.

Rep. 799. 2 Bos. & Pul. 159.

latter rule has been applied to the keeper of the *poultry* compter ^t, and *marshalsea*-court officers ^u. But if a person who, by the rules of the court, is not permitted to become bail, be put into the bail-piece, and not excepted to, the plaintiff cannot take an assignment of the bail-bond, and proceed upon it, as if no bail had been put in ^v. Bail may be asked, whether they have not been in the pillory for *perjury* ^w: And they are liable to the punishment of this offence, if in any respect they forswear themselves ^x.

Where the bail do not attend, or are not permitted to justify, on account of a defect in the notice of bail or justification, the court, as a favour, will in general allow them further time to justify ^y. But where they are rejected, on account of some personal insufficiency, the court will seldom allow further time to add and justify others ^z. And in all cases, where a motion is made for giving further time to justify bail, it must be supported by an affidavit of the special facts, alleged in excuse of the bail not attending at the time mentioned in the notice

^t Doug. 466.

^u *Per Cur.* T. 18 G. III.

^v *Thomson v. Roubell*, E. 22

G. III. cited in Doug. 466.

2 East, 181. *acc.* but see 1

Bos. & Pul. 356. 2 Bos. &

Pul. 564. *contra.* And an at-

torney or his clerk may be bail in this court, for the purpose

of rendering the defendant.

Per Cur. M. 42 G. III.

^w 4 T. R. 440.

^x Cro. Car. 146.

^y Lofft, 72. 187. *Per Cur.*

M. 25 G. III. and see 1 Bos.

& Pul. 660.

^z *Per Cur.* T. 24 G. III.

notice of justification; or in case further time be given, upon suggestion of counsel, then the bail shall not be permitted afterwards to justify, unless at the given time, such an affidavit be produced as before described ^a. If the bail do not justify at the time appointed, and no further time be given, they are out of court ^b.

When the bail are *allowed*, a rule or order of allowance ^c should be drawn up, with the clerk of the rules, and a copy of it served on the plaintiff's attorney, even though he has opposed their justification ^d: after which, the bail-piece should be obtained from the judge's chambers, and filed with the master. This should regularly be done the same term in which they were allowed ^e. And in filing the bail, it should be observed, that every bail taken on or before the continuance-day, is a bail, and to be filed of the *preceding* term; and every bail taken after the continuance-day, is a bail, and to be filed of the *subsequent* term ^f: but where new bail are added to other bail taken on or before the continuance-day, the new bail shall be taken and filed as of that term, in which the first bail was put in ^g.

The

^a R. M. 36 G. III.

^b 1 Crompt. 66. 7 Mod. 50.

^c Append. Chap. XI. § 20.

^d 4 T. R. 493. 2 Bos. &

Pul. 341.

^e R. H. 1650. reg. 3.

^f R. E. 5 G. II. Reg. 1.

(b). And as to the *continuance-day*, see R. E. 11 W. III. Reg. 2. 2 Str. 1215. 1 East, 406.

^g R. E. 5 G. II. Reg. 1.

(b). 1 Salk. 100. *semb. contra*

The bail-piece being filed, an entry should be made of the recognisance on a roll, called the recognisance-roll; which should be docketed^h, and carried in to the treasury chamber: And this should regularly be done, before any proceedings are had against the bailⁱ; or at least before they are called upon to plead: For otherwise they may plead *nultiel record*; and if the recognisance-roll be not carried in till afterwards, it seems that they may withdraw their plea, and the plaintiff must pay the costs of it. The recognisance of bail by *bill* is entered by the plaintiff's attorney, after the declaration, with a *memorandum* of the term it is of^j; but by *original*, it is entered by a *filacer*, after a recital of the process^k.

Such are the means of putting and perfecting bail above, where the defendant is *at large*, in order to prevent an assignment of the bail-bond, or proceedings against the sheriff. Bail above may also be put in and perfected, at any time pending the action, where the defendant is in *custody* of the sheriff or marshal*.

Before we dismiss the subject of bail, it will be proper to notice how far they are *liable*; and when, and in what manner, they may be *discharged*, by the render of their principal, &c. The

^h Append. Chap. XI. § 22.

ⁱ *Id. ibid.* Append. Chap.

^j R. E. 5 Geo. II. Reg. 3. XI. § 21.

(a).

^k *Id.* § 23.

* *From the Addenda to the London edition.* And by a late act of parliament, (43 Geo. III. c. 46. § 6.) "if any defendant shall be taken, detained or charged in custody, at the suit of any person or persons, upon mesne process issuing out of any of his Majesty's courts of record at *Westminster* or *Dublin*, and shall be imprisoned or detained thereon, after the return of such process, it shall and may be lawful for such defendant, in vacation-time only, and upon due notice thereof given to the attorney for the plaintiff or plaintiffs in such process, to put in and justify bail, before any one of the justices or barons of the court out of which such process shall have issued; who may, if he shall think fit, thereupon order a rule to issue for the allowance of such bail, and may further order such defendant to be discharged out of custody, by writ of *superseas* or otherwise, according to the practice of such court, in like manner as the same is and may be done by an order of court in term-time."

The ancient course of the court was, that if a man became bail for another upon a *latitat*, &c. in any sum of money, however trifling, he was bail for him, in all actions brought by the same plaintiff, during the same term, were the sums ever so great¹. To rectify this extraordinary practice, a rule was made, that if the plaintiff should declare against the defendant, upon any bail by him put in, for a *greater* sum than was expressed in the process, upon which the defendant was arrested, then the bail so put in should not be chargeable in that action^m. Still however, the bail were liable to all actions, wherein the plaintiff declared for, and recovered a *less* sum than was expressed in the processⁿ; and where he declared for, and recovered a *greater* sum, the bail were totally discharged^o. At length it was resolved, that as on the one hand, there was no colour to subject the bail to more than they were bound in, let the plaintiff's demand be ever so much more; so, on the other hand, there was no reason why the plaintiff should suffer by his moderation in taking bail; but the recognisance should be considered as an agreement, to pay to the extent of the sum sworn to and costs, or render the defendant^p. And, accordingly, it is
now

¹ Cro. Jac. 449. 2 Sid. 163. ⁿ 3 Keb. 16.

1 Mod. 16.

^o 6 Mod. 266. 1 Salk. 102

^m R. T. 22 Car. II. 6 Mod. S. C.

257.

^p 2 Str. 922.

now settled, that where the plaintiff declares for or recovers a *greater* sum than is expressed in the process, upon which he declares, the bail shall not be discharged; but be liable for so much as is sworn to, and indorsed on the process, or for any less sum, which the plaintiff in such action shall recover^q, together with the costs of the original action^r: but they are not liable to pay the costs of a writ of error^s; nor is the plaintiff entitled to levy equitable costs, out of the penalty of the recognisance^t.

The defendant having put in bail, may render himself, or be rendered, in their discharge, before or after judgment^u. And there is no occasion for the bail to justify, in order to render, even after they are excepted to; or though the sheriff has been ruled to bring in the body^v. This rule has been extended to the case of the sheriff^w; who is therefore entitled to the benefit of a render made at any

^q R. E. 5 Geo. II. *Reg.* 2. Lofft, 545. Doug. 330. 8

T. R. 28, 9. 1 East, 90. In the Common pleas, each of the bail is separately liable to the full extent of the recognisance. 1 Bos. & Pull. 205.

^r The rule of E. 5 G. II. is silent as to the costs. But in the case of *Peterken v. Sampson* and another, M. 25 G. III. it was determined by the court, that the bail are

liable to pay them, as well as the sum sworn to.

^s 6 T. R. 288.

^t 2 Str. 826. 1 Barnard. K. B. 125. S. C.

^u 1 Str. 198.

^v *Ashton v. King* and another, M. 21 G. III. R. T. 33 G. III. 5 T. R. 368. Barnes, 111. 117. 2 Blac. Rep. 758. 1179, 80.

^w 7 T. R. 527.

any time before the day allowed by the rule for bringing in the body is expired^x: and even bail who have been rejected are, while on the bail-piece, competent to make a surrender^y. But if the sheriff be once in contempt, for not bringing in the body, that contempt is not purged by the defendant's rendering on a subsequent day, though before an attachment is moved for against him^z. As between the plaintiff however, and the sheriff's bail, the latter are allowed to render the defendant, without justifying, after the regular time of justification is expired, so as to stay the proceedings against them on the bail-bond, upon payment of costs^a.

It was anciently the course of the court, not to allow a render, after the return of *non est inventus* to a *capias ad satisfaciendum*^b. But a great mischief resulted from this practice; for the plaintiff would sue out a *capias* returnable the next day, so that the bail had little or no time to bring in the body^c: To remedy which, the judges indulged the bail so far, as to permit them to render the body, upon the return of the first *scire facias*, if the *capias* were returnable

^x 7 T. R. 527. 8 T. R. 464.

^y *Per Cur.* E. 40 G. III.

^z 8 T. R. 29. but see 5 T. R. 633. 1 H. Blac. 9. 1 Bos. & Pul. 325. 2 Bos. & Pul. 38. *contra*.

^a 5 T. R. 401. 534. 7 T. R. 529. but see 7 T. R. 297.

And it seems, that generally speaking, bail are not in a condition to make any motion to the court, until they have justified. 7 T. R. 226.

^b Cro. Eliz. 738.

^c 1 Ld. Raym. 157.

returnable *de die in diem*^d; but if it were returnable the next term, the bail were strictly holden to render the principal, by the return of it^e. *Popham* Ch. J. extended this indulgence still farther; and permitted the bail to render, any time before the return of the second *scire facias*, or upon the return, *sedente curiâ*^f. This practice, however, appears to have been disallowed by lord *Coke*^g: But it was soon after revived, in the time of *Croke* Ch. J.^h: and accordingly, it is now fully settled, that the render may be made at any time before the rising of the court, on the return-day of the second *scire facias*, or of the first, where a *scire feci* is returned, by *bill*ⁱ; or by *original*, at any time before the rising of the court on the appearance-day, or *quarto die post* of the return of the second *scire facias*^k, or of the first, where a *scire feci* is returned^l, and not after^m.

If the plaintiff proceed by action of *debt* on the recognisance, the render may be made by the space of *eight* intire days, in full term, next after the return of the *latitat*, or other process against the bailⁿ: If there be not the full number of days
in

^d Cro. Eliz. 618.^k 1 Wils. 270.^e *Id.* 738.^l 4 Burr. 2134.^f Cro. Jac. 109.^m 3 Bur. 1360. 1 Blac. Rep.^g Moor, 850. 3 Blust. 182. S. C.

393. S. C. But see 3 East, 145. where the time was enlarged

^h W. Jon. 139. Sty. Rep. 334. 8 Mod. 32.

for bail to surrender a bankrupt under examination.

ⁱ 1 Ld. Raym. 157. 6 Mod. 238. 8 Mod. 340.ⁿ R. T. 1 Ann. Reg. 1. 1 Salk. 101. 1 Ld. Raym. 721.

R. T. 1 Ann. II. (a). R. F.

6 Mod. 132.

^g G. II. Reg. 3. (a)

in the same term, they must be made up in the following one. And if an action be brought here against bail, on a recognisance taken in the Common Pleas, they have the same time allowed them for rendering the principal, as if the recognisance had been taken in this court^o. Where an action was commenced, and afterwards discontinued, and then the bail rendered the principal, before the bringing of a new action, the court held the render to be good, it being before the return of the process in this suit; and it was the fault of the plaintiff, not to begin right at first^p. So where the plaintiff sued the bail on their recognisance, who did not render the principal within eight days, and then the plaintiff died, and his executors brought another action against the bail, it was ruled that the bail had eight days from the return of the process in the second action, to render the principal^q.

Before the return of the *capias ad satisfaciendum*, the render is a matter of right, and may be pleaded^r. But afterwards it is allowed, by the grace and favour of the court^s, and not *ex debito justitiæ*; for the condition of the recognisance is broken, upon the return of *non est inventus* to the *capias*: and therefore a subsequent render cannot be pleaded;

^o 7 T. R. 555.

^p 2 Str. 915.

^q 8 T. R. 422.

^r 1 Ld. Raym. 156, 7.

R. T. 1 Ann. Reg. 2. (a)

pleaded^t; though, if made in time, the bail may be relieved by motion. If the bail, at any time after the return of the *capias*, render the principal at a judge's chambers, and he be committed to the tipstaff, from whom he escapes or is rescued, that will not be a good render^u; for the court will not suffer the plaintiff to be prejudiced, by their indulgence to the bail.

Where the defendant is *at large*^v, he may come and render himself, or be taken and rendered by his bail, either in *court*, if sitting, or before a *judge* at his chambers; and the court or judge will make an entry, or minute of the render^w and commitment^x, and cause the defendant to be sent therewith, in custody of a tipstaff, to the King's Bench prison. But where the defendant is already a *prisoner*, he must be brought up by a writ of *habeas corpus cum causâ*; which may be made returnable *immediate*^y: and upon this writ, (which may be granted, as well where the defendant is in custody on a criminal charge, as under civil process,) the court will either remand the defendant to his former custody, or commit him, as a prisoner of the court, to the custody of the marshal. Under every commitment, should be entered the state of the cause, at the time of the render: If before declaration,
the

^t *Keeley and Medley*, M. 24

G. III. Barnes, 106, 7.

^u 6 Mod. 238. R. T. 1 Ann.

Reg. 2. (a).

^v 6 Mod. 231.

^w R. T. 3 Ann.

^x Append. Chap. XI. § 24.

^y 3 Bur. 1875.

the sum sworn to on the arrest; but if after declaration, these words should be added, declaration filed or delivered, issue, or interlocutory judgment signed, as the case is: If after final judgment in debt, the debt and damages; in other cases, the quantum of the damages ^z.

Formerly, if the defendant had become *bankrupt*, and obtained his certificate, before the bail were fixed, the method was, for the bail to surrender him; and then for the defendant to apply to be discharged, upon an affidavit, stating his having become bankrupt, since the cause of action arose, and obtained a certificate of his conformity to the commission ^a. But of late, where a bankrupt is clearly entitled to his discharge, the court, to avoid circuitry, have ordered an *exoneretur* to be entered on the bail-piece, without the form of a regular surrender by his bail ^b. And this was allowed where the certificate was not obtained till after the return-day of the *capias ad satisfaciendum* ^c.

The defendant being rendered, *notice* thereof should be given, without delay, to the plaintiff's attorney ^d, and an *affidavit* made of the service of such

^z R. E. 8 G. III.

^a Cowp. 824.

^b *Id. ibid.* but see 2 Bos. & Pul. 45. 8 T. R. 609.

^c *Cleveland v. Dickenson and*

another, bail of *Tomkins*, E. 41. G. III.

^d 7 T. R. 528. 8 T. R. 225. 3 Bos. & Pul. 232. Append. Chap. XI. § 25.

such notice^e; to the end that the plaintiff, if he think proper, may charge the defendant in execution, or at least that he may not be at any further trouble or expence, in proceeding against the bail. If the plaintiff therefore, through want of notice, continue to proceed against the bail, though this will not vitiate the render, yet they shall not be relieved, until they have paid the charges^f. But the notice need not be given before the rising of the court, on the day of the render^g. And if the principal be surrendered in time, but the bail omit to give regular notice of it to the plaintiff, in consequence of which he proceeds upon the bail-bond, the bail may apply to set aside the proceedings, on payment of costs, even after execution levied, and the money is in the sheriff's hands^h.*

The next step to be taken, in order to discharge the bail, is to enter an *exoneretur* on the bail-piece; to effect which, the bail-piece, if not already got, should be obtained from the judge's chambers, and a certificateⁱ from the prison, that the defendant is in custody: these being carried to the master, he will enter an *exoneretur* on the bail-piece, which should then be filed; for if the bail-piece be filed, without

^e R. T. 1 Ann. Reg. 2. 6
Mod. 238. 8 Mod. 281. 4 Bac.
Abr. 420, 421. 5 T. R. 368. 8
T. R. 222. and see Append.
Chap. XI. § 26.

^f *Id. ibid.*

^g *Per Cur. H.* 26 G. III.

^h 8 T. R. 222.

ⁱ R. T. 3 Ann. (a).

* *From the Addenda to the London edition.* "After due notice of render of the principal, the plaintiff still proceeded against one of the bail, in an action of *debt* upon the recognisance, because no offer was made to pay the costs in the suit against him, nor any rule obtained to stay proceedings on payment of costs; and the court held the subsequent proceedings irregular, being contrary to the rule of *Trin. 1 Ann.* which declares that on such notice of render, all further proceedings against the bail shall cease." 3 East, 306.

without an *exoneretur*, the bail remain liable, though the defendant be actually in prison^k. Yet, where the bail-piece has been previously delivered out to be filed, to the plaintiff's attorney, who neglects to file it, he cannot proceed against the bail, for want of an *exoneretur*^l. And where the render is in other respects regular, the court will order an *exoneretur* to be entered on the bail-piece, upon paying the costs that have accrued subsequent to the render^m.

The only remaining circumstance necessary for discharging the bail, is to make an entry of the render in the marshal's book, kept in the King's Bench officeⁿ; it being holden, that until such entry be made, the defendant is not in custody, so as to charge the marshal, in an action of escape^o.

If the plaintiff declare against the defendant, for a *different* cause of action from what is expressed in the process^p, or affidavit to hold to bail^q; or, by

^k R. T. 1 Ann. Reg. 2. (a). pleas, a variance between the writ and count, (the *ac-etiam*
1 Salk. 98. 8 Mod. 282.

^l 8 Mod. 280. Barnes, 68. being in *case on promises*, but the declaration in *debt*, is not
S. P. , the ground for entering an *exoneretur* on the bail-piece, where

^m Say. Rep. 7, 8. 1 Bur. 409. a ground for entering an *exoneretur* on the bail-piece, where the sum sworn to is under 40*l*.

ⁿ R. T. 3 Ann. (a). the sum sworn to is under 40*l*.

^o 1 Salk. 272, 3. 2 Str. 1215. 1 H. Blac. 310.

1226. 2 Bur. 1049. 9 6 T. R. 363. 7 T. R. 80.

^p 2 H. Blac. 278. 2 Bos. & 8 T. R. 27

Pul. 358. But in the common

by *original*, in a *different* county from that where the action is brought^r; his bail are discharged: And they are also discharged, where the defendant *dies*^s, is made a *peer* of the realm^t, or *member* of the house of commons^u, or becomes *bankrupt* and obtains his certificate^v, &c. at any time pending the action: And in any of these cases, the court, on motion, will order an *exoneretur* to be entered on the bail-piece. But they will not relieve the bail, on the ground that the debt was contracted while the defendant was resident in a foreign country, and before he became a bankrupt by the laws of that country, though he may have obtained his certificate there^w.

If a defendant be sent out of the Kingdom, under the *Alien-bill*^x, the court will order the bail-bond to be delivered up to be cancelled^y, or permit the bail above to enter an *exoneretur*; unless they are indemnified, or have money in their hands belonging to the defendant, sufficient to answer the plaintiff's demand^z. And they will also permit an *exoneretur* to be entered, where the defendant is under sentence of transportation for a felony.

^r 3 Lev. 235. R. E. 2 G. H. 26 G. III.

II. (a).

^v 1 Bur. 244, 5. 436. Cowp.

^s But if the defendant die, 824.

after the return of the *ca. sa.*

^w 8 T. R. 609. *Ante*, 181

and before it is filed, the bail

^x 33 G. III. c. 4.

are fixed. 6 T. R. 284.

^y 7 T. R. 517.

^t Doug. 45.

^z 6 T. R. 50. 52. 246.

^u *Langridge one &c. v. Flood*,

felony^a. But where the defendant was in custody, under a charge of murder committed in *Ireland*, where a bill was found by the grand-jury against him, and application had been made to the secretary of state, to send him over there, in order to take his trial; the court, though they granted a *habeas corpus* to bring him up, in order that he might be surrendered by his bail, would not, without an actual surrender, allow an *exoneretur* to be entered on the writ-piece^b. We have already seen^c, that the court will not discharge the bail, on the ground of the insanity of their principal: And a *cognovit* by the principal, without notice to the bail, does not discharge them^d.

^a 6 T. R. 247.

^c *Ante*, 184.

^b 7 T. R. 226.

^d 5 T. R. 277.

CHAPTER XII.

Of the PROCEEDINGS upon the BAIL-BOND; and against the SHERIFF, to compel him to return the WRIT, and bring in the BODY.

IF bail above, when necessary, be not put in and perfected in due time, the bail-bond is forfeited; and the plaintiff may either take an *assignment* of it, or proceed against the *sheriff*, to compel him to return the writ, and bring in the body of the defendant ^a. If the bail below be sufficient, it is usual for the plaintiff to take an assignment of the bail-bond; which it seems he may do, even after service of the rule to bring in the body ^b. But by taking an assignment, he discharges the *sheriff* ^c; and if the same bail be put in above, he cannot except against them ^d: And therefore if the plaintiff be dissatisfied with the bail below, he should proceed against the *sheriff*.

Before the statute for the amendment of the law ^e, the *sheriff* was not compellable to assign the bail-bond ^f; though if he had not assigned it, the court would

^a Gilb. C. P. 20.

¹ Wils. 223. *Williams* and

^b *Robinson*, Assignee, &c. v. *Jacques*, M. 24 G. III.

Owen, bail of *Dunkin*, M. 36

^d *Ante*, 223. R. M. 6 G. II.

G. III. K. B. Imp. K. B. 148.

Reg. 2. C. B. *contra*.

159. *contra*.

^e 4 & 5 Ann. c. 16. § 20.

^c Gilb. C. P. 21. 1 Salk. 99.

^f 1 Mod. 228.

would have amerced him^s: and the old way was, first to give a rule for the sheriff to bring in the body, before the plaintiff could take an assignment of the bail-bond^h. Another mischief at common law was, that after an assignment of the bail-bond, the action thereupon must have been brought in the name of the sheriff, who might have released it, and thereby driven the plaintiff into a court of equityⁱ. To remedy these inconveniences it was enacted, by the above statute, “ that if any person or persons shall be arrested, by any writ, bill, or process, issuing out of any of the courts of record at Westminster, at the suit of any common person, and the sheriff or other officer take bail from such person, against whom such writ, bill, or process is taken out, the sheriff or other officer, at the request and costs of the plaintiff in such an action or suit, or his lawful attorney, shall assign to the plaintiff in such action the bail-bond, or other security taken from such bail, by indorsing the same, and attesting it under his hand and seal in the presence of two or more credible witnesses, which may be done without any stamp; provided the assignment so indorsed be duly stamped, before any action be brought thereupon: and if the said bail-bond or assignment, or other security taken for bail, be forfeited, the

“ plaintiff

^s 1 Sid. 28. 2 Mod. 84.

ⁱ Gilb. C. P. 21.

^h 1 Salk. 99.

“ plaintiff in such action, after such assignment
 “ made, may bring an action and suit thereupon in
 “ his own name: and the court where the action is
 “ brought, may, by rule or rules of the same court,
 “ give such relief to the plaintiff and defendant in
 “ the original action, and to the bail, upon the said
 “ bond, or other security taken from such bail, as is
 “ agreeable to justice and reason; and that such rule
 “ or rules of the said court shall have the nature and
 “ effect of a defeasance to such bail-bond, or other
 “ security for bail.”

Upon this statute, it has been said, the bail-bond may be assigned *before* it is forfeited, though it cannot be put in suit till afterwards¹. But however this may be, it has been holden, that if the fourth day for perfecting bail be the last day of term, and the bail be not perfected before the rising of the court on that day, an assignment of the bail-bond to the plaintiff, in the evening of that day, is regular¹. And where the defendant had neglected to put in and perfect bail above, the court held that the plaintiff was not out of court, by omitting to declare in the original action, within two terms after the return of the writ; but he might still take an assignment of the bail-bond^m: for he was not bound

^k Barnes, 77.

K. B. 150. Prac. Reg. 71. 2

^l 8 T. R. 4.

Blac. Rep. 876. C. B. *contra*

^m 2 Str. 1262. *Carmichael v.*

and see 3 Bos. & Pul. 221

Troutbeck, T. 24 G. III. Imp.

bound to declare *de bene esse*, within the time limited for the defendant's appearance, and after that time he could not declare, until the defendant had actually appeared.

The assignment may be made by the high-sheriff, or by the under-sheriff in *his* name; and even by the under-sheriff's clerk in his office ^o. And as the assignment may be made, so the action may be brought, in any county ^p. But it must necessarily be brought in the *same* court, from whence the process issued, on which the bail-bond was taken ^q: otherwise the parties could not have the relief intended by the statute. And the assignment must be *stamped*, before the bringing of the action ^r.

The proceedings on the bail-bond may be *set aside*, if irregular; or *stayed*, if regular, upon terms, in order that there may be a trial in the original action. The causes of irregularity are as various, as the different proceedings out of which they arise. In a late case ^s, the assignment of the bail-bond was set aside, as having been made pending a rule to set aside

^o *Per* *Ld. Mansfield*, in *Harris v. Ashley*, Sit. Mid. M. 30 G. II. *French v. Arnold*, T. 3 G. III. 1 Str. 60. (1). *Kitson and Fagg*, 1 Str. 60. 10 Mod. 288. S. C. *contra*.

^p 2 Str. 727. 2 *Ld. Raym.* 1455. S. C.

^q 1 *Bur.* 640 3 *Bur.* 1923.

Barnes, 92. 3 *Wils.* 348. 2 *Blac. Rep.* 838. S. C. which rule applies in this court, to actions brought on the bail-bond, by the *sheriff* himself, as well as his *assignee*. 8 *T. R.* 152. 1 *H. Blac.* 631. C. P. *contra*.

^r *Ante*, 146. ^s 4 *T. R.* 176.

aside proceedings for irregularity, *and to stay proceedings in the mean time*; the proceedings being suspended thereby for all purposes, till the rule was discharged. But the court will not order the bail-bond to be delivered up to be cancelled, on the ground of a misnomer^t.

Where the plaintiff has not lost a trial, the court or a judge will stay the proceedings on the bail-bond, without an affidavit of merits^u, upon putting in and *perfecting* bail above; paying the costs incurred by the assignment of the bail-bond, to be taxed by the master; receiving a declaration in the original action; pleading issuably, and taking short notice of trial, so that the cause may be tried the same term^v. And wherever the defendant is guilty of a neglect, in not putting in bail in due time, by which the bail-bond becomes forfeited, the notice (in case the party means to put in bail, in order to stay proceedings upon the bail-bond), should be, that he will put in and *perfect* bail on such a day; when the plaintiff may oppose them in court, without its being a waiver of the bail-bond^w. But if the plaintiff have lost a trial, the court will further require an affidavit of merits, and that the bail consent that the bail-bond shall stand as a security. The rule *nisi* or summons to set
aside

^t 3 T. R. 572. 2 Bos. & Pul.

^v R. M. 8 Ann. Reg. 1. (c)

^u 09.

Cowp. 71. 1 Bos. & Pul. 334

^w *Per Cur.* M. 42 G. III.

^w Cowp. 769.

aside the proceedings, is *entitled* in the original action ^x; and when the rule is made absolute, or a judge's order obtained upon the summons, it is incumbent on the defendant immediately to get an appointment thereon from the master, to tax the costs, and to serve a copy of it upon the plaintiff's attorney; and when the costs are taxed, to pay the same without delay ^y.

The sheriff's bail are liable to pay what is really due to the plaintiff, though beyond the sum sworn to and costs, to the full extent of the penalty of the bond ^z: And each of them is liable for his own costs, as well as those of the original action. And where *several* actions are brought, it is usual, in suing out execution, to apportion the debt and costs in the original action, amongst the different defendants, so as to levy a part on each, together with his own costs.

^x 4 T. R. 689. *Kettle v. Woodfield*, T. 40 G. III. K. B. 3 Bos. & Pul. 118. C. P. *accord.* and note, in the case of *Hyde v. Whiskard*, 8 T. R. 456. the affidavits were entitled in the original action, and no objection was taken thereto. But see Willes, 461. Barnes, 94. S. C. 1 Bos. & Pul. 337. *semb. contra*. The distinction seems to be, where the application is made in the original action, to stay all the proceedings on the bail-bond given in that ac-

tion, and where it is made in the action on the bail-bond; in the former case, the rule or summons and affidavits should be entitled in the original action; in the latter, it seems that they may be entitled in the action wherein the application is made.

^y Imp. K. B. 152. 1 Sel. Pr. 201.

^z *Savage v. West*, 9 G. III. cited in Cowp. 71. 8 T. R. 28. 1 East, 91. *in notis*. K. B. 1 H. Blac. 76. C. P.

costs. If the *plaintiff* die after the arrest, and before the return of the writ, the court will set aside proceedings on the bail-bond ^a. And where the *defendant* dies, before the plaintiff could have had judgment against him, if there had been no delay in putting in and perfecting bail, the court will stay proceedings on the bail-bond, upon payment of costs only ^b: but they will not relieve the sheriff's bail, upon the death of the defendant, where the plaintiff might have had judgment against him, if bail above had been put in and perfected in time ^c. And the bail cannot avail themselves of the *bankruptcy* of the defendant ^d.

It was formerly holden, that the defendant could not discharge his bail to the sheriff, by *surrendering* himself before the return of the writ; for it was considered as a settled point, that nothing could be a performance of the condition of the bail-bond, but putting in and perfecting bail above ^e. But it has since been determined, that if the defendant surrender himself to the sheriff, before the return of the writ, the bail-bond may be given up to be cancelled; after which, the plaintiff cannot take an assignment of it ^f; nor can he rule the sheriff,

^a 8 Mod. 240.

Chael v. Chandler, Imp. K. B.

^b Cowp. 71. Barnes, 61. 70. 150.

^c R. M. 8 Ann. Reg. 1. (c) * 5 Bur. 2683. and see Dalt. Gilb. K. B. 362. Cowp. 71. Sher. 356.

Barnes, 112.

^f *Callaway v. Seymour*, E.

^d 1 Bur. 244. 436. *Carmi-* 42 G. III.

sheriff, or maintain an action against him for not assigning it ^g. But it is optional in the sheriff, whether he will accept the surrender of the party, in discharge of the bail-bond, before the return of the writ: and therefore where notice of such surrender was given to the sheriff, and to the gaoler in whose custody the party then was, at the suit of another; after which the gaoler let the party out of custody; the court held that the gaoler was not liable, upon his bond of indemnity to the sheriff, as for an escape in the former suit; for the party was not legally in the custody of the sheriff or his gaoler, merely by virtue of such surrender ^h. And it seems that rendering the defendant to the King's Bench prison, before the return of the writ, will not discharge his bail to the sheriff. Where the defendant is surrendered by his bail above, though without justifying, after the time allowed them for justification is expired, the court will stay the proceedings on the bail-bond, on payment of costs ^k.



If the plaintiff be dissatisfied with the bail taken by the sheriff, he should rule him to return the writ.

^g 6 T. R. 753. 7 T. R. 111. but see 3 Bos. & Pul. 232. 122. 8 T. R. 456. 505. and ^h 5 T. R. 401. 534. 7 T. R. 297. 529. and see 8 T. R. 222. *Inf.* 236.

^h 1 East. 383.

ⁱ *Forster v. Hyde*, M. 11 G.

writ¹. But this rule cannot be had, after the plaintiff has taken an assignment of the bail-bond², if valid; though if the bail-bond be void, it is otherwise³. So it has been holden, that if the sheriff appoint a special bailiff to arrest the defendant, at the request of the plaintiff or his agent, he cannot be ruled to return the writ⁴; but he is notwithstanding responsible for the safe custody of the defendant, after the arrest made⁵.

The rule to return the writ is a *four* day rule in *London* and *Middlesex*⁶, and a *six* day rule in any other city or county⁷. It is obtained from the clerk of the rules; and usually taken out on the return-day of the writ by *bill*, or *quarto die post* by *original*, in order that it may keep pace with the time to put in bail: But it cannot regularly be taken out *before*, though dated *on* the return-day⁸, or *quarto die post* by *original*⁹. And by statute 20 Geo. II. c. 37. § 2. “no sheriff shall be liable to be called upon to make a return of any writ or
“ process

¹ Gilb. C. P. 21. R. M. 6 G. II (a); and see Append. Chap. XII. § 1.

² *Ante*, 223. 245.

³ 1 Wils. 223.

⁴ 2 Blac. Rep. 252. 4 T. R. 119.

⁵ 8 T. R. 505. and see 2 Esp. Cas. *Ni. Pri.* 591.

⁶ R. T. 6 G. III. 4 Bur. 1921.

⁷ R. M. 6 G. II. In the collection of rules and orders, with which Mr. *Abbot* has obliged the profession, beginning in Easter term 1731, and ending in Trinity term 1795, this rule is stated as having been made in *Trinity* term 5 & 6 G. II. See p. 12.

⁸ 1 T. R. 552. 2 East, 242.

⁹ *Per Cur.* M. 42 G. III

“ process, unless he be required so to do, within “ *six* months after the expiration of his office:” Upon which statute it has been holden, in ease of sheriffs, that the months are *lunar* months^u; that the day of the sheriff’s quitting his office is to be reckoned as one^v; and that the sheriff cannot be ruled to return the writ, after the expiration of six months, though requested before^v.

The rule to return the writ, being intended to bring the sheriff into contempt, must be *personally* served on the sheriff himself, or his under-sheriff; and except in *London, Middlesex, and Surrey*, service on the under-sheriff’s agent in town is not deemed sufficient^w: For as six days only are allowed to return the writ, it might otherwise be impossible to obey the rule, in distant counties.

The sheriff being ruled to return the writ, either does, or does not return it. If there be no return, it is a contempt; for which the court, on a proper *affidavit*^x, will grant an attachment^y: and this is the constant mode of proceeding against the *late* sheriff^z, as well as the *present* one; for, as to the former, he ought in strictness to have returned the writ, before he was out of office, and therefore the contempt was actually committed, whilst he was a servant of the court^z. And it should be observed,

^u Doug. 463.

^v 2 T. R. 1.

^w Doug. 420. 5 T. R. 541

^x Append. Chap. XII. § 2

^y R. M. 6 G. II.

^z Doug. 464

served, that the sheriffs of *Chester*, *Durham*, and *Lancaster*, though not the immediate officers of this court, are amenable to it for contempts ^a. The writ should regularly be returned by the sheriff, on the day on which the rule for returning it expires; and in default thereof, the plaintiff may move for an attachment on the next day ^b. And in order to ascertain the time of making the return, the *custos brevium* is required to indorse on every writ, on what day, and at what hour, the same was filed ^c.

The sheriff's return to a *capias ad respondendum* is either that the defendant is *not found* in his bailiwick, or that he has *taken* him; and in the latter case, it is either that he has him *ready*, to answer the plaintiff; or, by way of excuse, that he is *sick* or *dead*, (*languidus, vel mortuus est;*) or that he has *escaped*, or been *rescued*; or that the sheriff has *discharged* him, or *delivered* him over to another custody, by direction of the plaintiff, or by order of the court ^d. * If the sheriff return *non est inventus*, where he has, or might have taken the defendant, he is liable to an action for a false return ^e; and if he return *cepi corpus et paratum habeo*, where he has taken the defendant, and let him go at large, without bail, he

^a *Jackson v. Garbutt*, M. 35 G. III. and see 6 T. R. 71.

^c R. T. 30 G. III. 3 T. R. 787.

^b R. M. 32 G. III. 4 T. R. 496.

^d Append. Chap. XII. § 3, &c.

^e 2 Esp. Cas. N. Pri. 475.

* *From the Addenda to the London edition.* "Or that he has been discharged from the arrest, under the statute 43 Geo. III. c. 46. § 2. on depositing in the sheriff's hands the sum indorsed on the writ, with 10*l.* in addition to answer costs, &c."

he is liable to an action, if the defendant be not in custody, or bail above be not put in and perfected, at the return of the writ^f. But where the sheriff has taken bail, he is not liable to an action, upon the return of *cepi corpus et paratum habeo* ; for it was his duty to take bail, and though the latter part of the return be not strictly true, yet this, which was the ancient return, is not altered by the statute 23 Hen. VI. c. 9. Still however, he might have been *amerced* by the court, upon such return, for not bringing in the body, or putting in and perfecting bail above^h; and in the beginning of the last reign, the practice of amercing the sheriff appears to have given way to the proceeding by attachmentⁱ.

If the defendant reside within a *liberty*, the bailiff of which has the execution and return of writs, it is usual for the sheriff to return, that he has made his *mandate* to the bailiff of the liberty, who has given him no answer, or has returned that the defendant is not found in his bailiwick, or that he has taken the defendant, and has him ready.

^f Gilb. C. P. 22. Noy, 39. 2 Mod. 83. 177. 3 Salk. 314, 1 Mod. 228. 2 Mod. 178. S. 15. *Ante*, 207, 8.

C. ^h Same cases; and R. M. 6

^g Cro. Eliz. 624. 808. 852. G. II. (a). 1 Wils. 262. 1 H. Noy, 39. S. C. 1 Sid. 22. Blac. 233, 4.

439. 1 Vent. 55, 85. 2 Saund. ⁱ 2 H. Blac. 434. (a).

60. 154. 1 Mod. 33. 57. 227.

readyⁱ. In the first case, the plaintiff is entitled to a *non omittas*, by the statute Westm. 2. c. 39.^j: In the second, if the return be false, the bailiff is liable to an action; the sheriff not being answerable at common law, for the *false* return of the bailiff^k: In the last case, the ancient mode of proceeding was by *distringas*^l; but it seems that the bailiff may now be called upon by *rule*, to bring in the body^m. If the bailiff make an *insufficient* return, he is liable to be amerced for it, and not the sheriff, by the statute 27 Hen. VIII. c. 24ⁿ.

Upon the sheriff's return of *cepi corpus et paratum habeo*, if bail above be not put in and perfected, the practice is, for the plaintiff to rule him to bring in the body^o. And where bail above is put in in due time, and notice thereof given to the plaintiff's attorney, the bail should be *excepted* to, and notice of the exception given to the defendant's attorney, before the sheriff is ruled^p: And the adding bail afterwards, does not supersede the necessity of such exception, before an attachment can issue against the sheriff,

on

ⁱ *Offt. Brev.* 216. *Ret. Brev.* *Jud.* 35, &c. *Append. Chap.* 168, 9. *Append. Chap.* XII. XII. § 11, 12.

§ 10.

^m 2 T. R. 5.

^j *Gilb. C. P.* 26. 1 Barnard. K. B. 282.

ⁿ *Gilb. C. P.* 30.

^o *Append. Chap.* XII. § 13.

^k *Gilb. C. P.* 30.

^p *Lofft*, 159. 8 T. R. 258.

^l *Id.* 31. *Brownl. Brev.*

on account of the added bail not having justified in time^q. But where bail above is not put in, at the time of calling upon the sheriff, he must put in and perfect it at his peril, or render the defendant, without an exception^r.

The rule to bring in the body is a *four* or a *six* day rule^s, and should be served in like manner as the rule to return the writ. The intent of this rule, where the defendant is not in custody, is to compel the sheriff to put in and perfect bail above^t: And it cannot in general be taken out, till the day after the expiration of the rule to return the writ^u; for it is necessary that the proceedings against the sheriff should keep pace with the times allowed for putting in and perfecting bail; otherwise this inconvenience might ensue, that the sheriff might be fixed with the payment of the debt and costs, and upon his bringing an action against the defendant or his bail, upon the bail-bond, they might plead *comperuit ad diem*. And a rule to bring in the body, tested on the day of the return by the sheriff of *cepi corpus*, though issuing afterwards in the vacation, is irregular^v. But where the writ, in a *country* cause, was

^q 8 T. R. 258.

Wils. 262. 1 H. Blac. 233, 4.

^r *Per Cur.* E. 24 G. III.

^u 5 T. R. 479. *Spicer v.*

^s R. M. 6 G. II. R. T. 6 G. III. 3 Bur. 1921.

Linnell, E. 23 G. III. C. P.

Imp. K. B. 159.

^t R. M. 6 G. II. (a). 1

^v 2 East. 241.

was returnable on the *first* of June, and the sheriff was ruled to return it on the *second*, and on the *eighth* he returned *cepi corpus*, upon which the plaintiff, on the *same* day, served him with a rule to bring in the body, and on the *fifteenth* obtained an attachment, the court held the proceedings to be regular; although it was objected, that the sheriff had all the *eighth* to return the writ, and consequently that the rule to bring in the body should not have been served till the *ninth*: for in this case, the time for putting in bail had expired, before the service of the rule to bring in the body^v. After the expiration of the rule to return the writ, there should be no delay in ruling the sheriff to bring in the body: for where the sheriff had returned *cepi corpus* to aailable writ in *Hilary* term, upon which the plaintiff proceeded no further till *Michaelmas* term following, and in the mean time the bail became insolvent, and the defendant absconded; the court thought it unreasonable that the sheriff should be called upon to bring in the body after such delay, and they set aside an attachment which had issued against him for not doing it^x.

When the sheriff is called upon to bring in the body, he must either bring it into court, or put in and perfect bail above, within the time allowed him

^v *Parker and Wall*, M. 26
G. III.

^x 7 T. R. 452. and see 3
Bos. & Pul. 151.

him by the rule ^y: Otherwise it is a contempt, for which the court will grant an *attachment*, on an *affidavit* of the service of the rule, and that no bail has been put in; or that bail has been put in, but not perfected ^z. But the contempt is not incurred, till the day is past, on which the rule to bring in the body expires; for the sheriff has the whole of that day to bring it in, and therefore an attachment cannot be moved for till the next day ^a.

It was formerly usual to proceed against the *late* sheriff, for not bringing in the body, by *distringas* ^b. But now, by rule of court ^c, where any sheriff, before his going out of office, shall arrest any defendant, and a *cepi corpus* shall afterwards be returned, he shall and may, within the time allowed by law, be called upon to bring in the body, by a rule for that purpose, notwithstanding he may be out of office, before such rule shall be granted. The *distringas* against the *late* sheriff was a judicial writ, issuing out of the King's Bench office by *bill*, or filacer's office by *original*, and directed to his successor; commanding him to *distrain* the *late* sheriff, by all his lands, &c. so that he might have the defendant's
body

^y 1 Wils, 262. R. M. 6 G. ^b Trye, 144, 5. 2 Lil. P.
II. (a). R. 510. 5 Bur. 2726. Doug.

^z Append. Chap. XII. § 14. 464.

^a *Rex v. Sheriff of Essex*, ^c R. T. 31 G. III. 4 T. R.
H. 36 G. III. 7 T. R. 528. 379.

⁸ T. R. 464.

body in court to answer the plaintiff^d. This writ must have been made returnable on a day *certain* or *general* return, according to the former proceedings^e; and must have lain four days *exclusive* in the sheriff's office; but it need not have been left there *before* the return, it being deemed sufficient to leave it *on* the return-day^f. Upon the first *distringas*, the sheriff to whom it was directed, levied issues to the amount of forty shillings, which the plaintiff moved to increase; and if the debt were small, the court would order the whole of it to be levied, with costs, upon an *alias distringas*: but otherwise the plaintiff moved again to increase the issues, and sued out a *pluries distringas*, &c. and when issues were returned, to the amount of the debt and costs, the plaintiff moved for a sale of them, under the statute 10 Geo. III. c. 50^g.

The *attachment*^h is a criminal process, directed to the *coroner*, when it issues against the *present* sheriff; or when against the *late* one, to his successor: And it must be made returnable at a *general* return, though the original process was at a day *certain*ⁱ.

The

^d Brownl. *Brev. Jud. Thes. Brev. and Off. Brev. tit. Distringas*. And see Append. Chap. XII. § 11, 12.

^e Trye, 144, 5.

^f *Per Cur.* H. 23 G. III.

§ 5 Bur. 2726, 7. The mode of proceeding by *distringas* against the *late* sheriff, on *mesne*

process, is obsolete, in consequence of the rule of T. 31 G. III. before stated; but it may still be used against the *bailiff* of a liberty, for not bringing in the body. *Ante*, 257.

^h Append. Chap. XII. § 15.

ⁱ 1 Str. 624.

The attachment may be moved for on the *last* day of term ^k; and until it be granted, the proceedings are on the *plea* side of the court, and must be entitled with the names of the parties: But as soon as the attachment is granted, the proceedings are on the *crown* side, and from that time the king is to be named as the prosecutor ^l. If the coroner or sheriff, being called upon by rule, neglect to return the *attachment*, he may be attached himself; and the attachment against the *coroner* should be directed to *clisors*, named by the master.

When the sheriff is fixed for a contempt, he is liable, in like manner as his bail upon the bail-bond, to the payment of what is really due to the plaintiff, though beyond the sum sworn to and costs, to the full extent of the penalty of the bond ^m: And upon issuing the attachment, he usually pays the amount of the debt and costs, and is reimbursed by his officer; who either puts the bail-bond in suit, if any was taken, in the sheriff's name; or, if no bail-bond was taken, brings an action against the defendant, in his own name, for money paid ⁿ.

The

^k 1 Bur. 651.

^l 3 T. R. 133. 253. 7 T. R. 439. 528. 2 East, 182.

^m 7 T. R. 370. 8 T. R. 28. 1 H. Blac. 233. 543. C. P. But he is not liable beyond the penalty of the bond: 3 East, 604. And see Doug. 464. where *Buller* Justice seemed to consider, that when the sheriff should come to purge the

contempt, it would be competent for the court to moderate the punishment, and not impose a fine to the amount of the whole debt; though, in order to proportion it to the actual damages, he thought they must be ascertained by a jury.

ⁿ 1 Esp. Cas. *Ni. Pri.* 383. but see the case of *Rogers v. Reeves*. 1 T. R. 418

The sheriff cannot be relieved on the ground of the defendant's *death*, after the contempt was incurred, and before the attachment issued °. But the proceedings against him may be superseded, if *irregular*; or if *regular*, may be set aside, by the favour and indulgence of the court, in order to let in a trial of the merits, for the benefit of the sheriff, or of the defendant or his bail. If the plaintiff has not lost a trial, the court will set aside the proceedings, upon putting in and perfecting bail above, and payment of costs p: In such case however, if the application be made on behalf of the defendant, they will require an affidavit of merits; or if made by the sheriff, who cannot be expected to swear to merits, an affidavit is required, that the application originated from him, and was not made in collusion with the defendant in the cause q. If a trial has been lost, the court will further require, that the attachment shall remain in the office, and stand as a security to the plaintiff, for the sum recovered r. And when the sheriff has been guilty of a breach of duty, in discharging the defendant out of custody, without the plaintiff's assent, upon his *own* undertaking to appear and put in bail, instead of taking a bail-bond, the court will not assist him, by staying the proceedings in an action for an escape, or by setting aside the attachment s.

° 3 T. R. 133.

G: III. B. R. cited in 4 T. R.

p 4 T. R. 352.

352.

q 7 T. R. 239.

s 7 T. R. 109. 239.

r *Gravett v. Williams*. T 15

CHAPTER XIII.

Of the PRIVILEGES and DISABILITIES of ATTORNIES: of the PROCEEDINGS in ACTIONS by and against them; and of the RECOVERY and TAXATION of their COSTS.

HAVING in the preceding chapters shewn the various modes of commencing actions in ordinary cases, and of bringing the defendant into court, when at large; I shall now proceed to consider whatever is peculiar to the case of *attornies* and officers, who are supposed to be already in court, or of *prisoners* in actual custody: and therein shall set forth, not only the mode of commencing, but also the subsequent proceedings in actions against them.

An attorney is supposed to be always present in court: and on that account, has many *privileges* belonging to him, in common with the other officers of the court. Where an attorney is *plaintiff*, he is entitled to sue in his own court, by *attachment* of privilege^a; and may lay the venue in *Middlesex*^b. Where he is *defendant*, he must be sued in his

^a Gilb. C. P. 3. *Middlesex*, when it is laid in

^b 2 Salk. 668. 4 Bur. 2027. another county. *Id. Per Cur.*
3 T. R. 573. But an attorney H. 24 Geo. III. 2 Str. 1049.
defendant has not the privilege *contra.*
of changing the venue into

his own court by *bill*^c, even as acceptor of a bill of exchange^d; and cannot be arrested or holden to special bail^e. It is also said, that an attorney is entitled to have his cause tried at bar^f. And as an attorney is not subject to the jurisdiction of the court of conscience, except where he is expressly made liable thereto, as in *London*^g, *Westminster*^h and the *Tower Hamlets*ⁱ, he may in all other cases sue^k and be sued^l, in his own court, for debts under forty shillings. Where an attorney is arrested upon process issuing out of an *inferior* court, he may sue out his writ of privilege^m, which ought to be allowed *instante*ⁿ: But if he be arrested upon process issuing out of a *superior* court, his remedy, we have seen^o, is by moving to be discharged out of custody on common bail, or by finding special bail, and pleading his privilege in abatement.

An attorney is also, by reason of the supposed necessity of his attendance in court, exempt from all offices that require *personal* service, as *sheriff*^p, *constable*^q, *overseer of the poor*^r, &c.: and formerly, he

^c 3 Blac. Com. 289.

^d Doug. 312.

^e 1 Mod. 10.

^f 6 Mod. 123.

^g Stat. 39 & 40 Geo. III.

^h c. 104. § 10.

ⁱ 24 Geo. II. c. 42. § 1.

Doug. 381.

^j 19 Geo. III. c. 68. § 24.

^k Doug. 382. *in notis*.

^l 2 Wils. 42. Doug. 381.

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3 Bur. 1583. *contra*.

^m Append. Chap. XIII. § 1.

ⁿ Cas. Pr. C. B. 2. 2 Blac. Rep. 1087.

^o *Ante*, 172.

^p 4 Bur. 2109.

^q Doug. 538. and see 1 Esp. Cas. *Ni. Pri.* 359.

^r 2 Blac. Rep. 1126. 8 T. R. 379. (a). and see Append.

Chap. XIII. § 2

2 M

he was not liable to serve in the *militia*^s; but several acts of parliament that have been passed in the course of the present reign, having allowed personal service in the *militia* to be commuted for a certain sum of money, to be laid out in providing a substitute, It has been holden that this exemption no longer exists^t.

These privileges are allowed, not so much for the benefit of attornies, as of their clients^u; and are therefore confined to attornies who practise^v, or at least have practised within a year; for it is a rule, that such attornies as have not been attending their employment in this court for the space of a year, unless hindered by sickness, be not allowed their privilege of attornies^x: And an attorney, not having practised for sometime previous to the issuing of the plaintiff's writ against him, is not privileged from being arrested thereon, and held to bail, on the ground of having recommenced his practice, and taken out his certificate, before he was actually arrested^v. Where the plaintiff and defendant are attornies of *different* courts, the

^s Barnes, 42. Andr. 355. 2 1667. *contra*.

Str. 1143.

^w Ridley and Carr, E. 1656.

^t Gerard's Case, 2 Blac. Rep. 1123.

1 Lil. P. R. 142. *Chippendale's* Case, E. 19 Geo. III. *Sand*

^u 2 Wils. 44. 4 Bur. 2113. Doug. 381.

v. *Heysham*, H. 24 Geo. III.

^x R. M. 1654. § 1.

^v 2 Wils. 232. 4 Bur. 2115.

^y 7 T. R. 25.

3 Blac. Rep. 1086. 2 Lutw.

the plaintiff is allowed his privilege of suing the defendant by attachment^z: and in this case it is commonly said, that there is no privilege against privilege; or in other words, the privilege of the plaintiff takes away that of the defendant; for the attendance of the plaintiff is as necessary in his court, as that of the defendant in his, and therefore the cause is legally attached in the court where the plaintiff is an officer^a. But where the plaintiff and defendant are both attornies of the *same* court, the defendant is entitled to his privilege, of being sued by *bill*^b; and if not so sued, he may plead his privilege in abatement, or the court on motion will stay the proceedings, but without costs^c.

An attorney may also *waive* his privilege, either when plaintiff, by suing as a common person^d; or when defendant, by not claiming it in due time, or in a proper manner^e. And where an attorney of the Common Pleas is in the actual custody of the marshal, he may be sued in this court as a prisoner, by *third* persons. But where an attorney of the Common Pleas puts in bail, to an action depending in this

^z 2 Brownl. 266. 2 Str. 524.

837. 1 Barnard. K. B. 182. ^c 6 T. R. 524. 8 T. R. 395.

228. S. C. 1 Blac. Rep. 19. Barnes, 53.

Barnes, 44. 2 Blac. Rep. 1325. ^d 2 Str. 837. 1 Barnard.

^a 4 Bac. Abr. 227.

228. S. C. and see 1 Bos. &

^b 2 Str. 1141. 1 Blac. Rep. Pul. 629. 2 Bos. & Pul. 29.

19. 2 Blac. Rep. 1085. 6 T. R. ^e 2 Blac. Rep. 1088.

this court, he does not thereby lose his privilege; but may plead it in that action, or in any other brought against him by the *bye*; for it would be absurd, that he who founds his action on that of another, should be in a better condition than the original plaintiff^f. Yet where an attorney, after having put in bail, waives his privilege, by pleading in *chief* in one action, it is construed to be a waiver of privilege, in all other actions brought against him by the *bye*, during the same term^f. It is likewise settled, that an attorney shall not be allowed his privilege as against the king^g, or where he sues or is sued *en auter droit*, as executor or administrator^h; or jointly with his wifeⁱ, or other person who is not privileged^k; or where there would otherwise be a failure or defect of justice, as where an *appeal* is brought in this court, a *real* action in the Common Pleas, or a *foreign attachment* in the sheriff's court of *London*, against an attorney of a different court^l.

As

^f 27 Hen. VI. 6. a. 31 Hen. VI. 10. Carth. 377. 1 Salk. 1, 48.

2. 1 Ld. Raym. 135. S. C. 12 Mod. 102. 112. 535. 1 Str. Raym. 533. S. C.

191. ⁱ Bro. Abr. tit. *Bill*, pl. 2.

^g 1 Ld. Raym. 27. But actions *qui tam* are not considered as the king's actions. T. Dyer, 377. (a).

^k 2 Rol. Abr. 274. 2 Salk. 544. 12 Mod. 163, 4. *Pratt v. Salt*, H. 8 Geo. II. cited in 4 Bac. Abr. 223.

^l 1 Saund. 67. 8 T. R. 417 318. 12 Mod. 74. S. C. 1 Blac.

As an attorney is entitled to many privileges, so he is subject to some *disabilities* and restrictions. By statute 1 Hen. V. c. 4. “no *under-sheriff*, *sheriff’s clerk*, receiver, or sheriff’s bailiff, shall be attorney in the king’s courts, during the time that he is in office.” And by the statute 22 Geo. II. c. 46. § 14. “no *clerk of the peace* or his deputy, nor any under-sheriff or his deputy, shall act as a solicitor, attorney or agent, or sue out any process at any general or quarter sessions of the peace, to be held for any place where he shall execute his office, upon pain of forfeiting fifty pounds.” By rule of *Mich.* 1654. § 1. “no attorney can be *lessee* in ejectment; or *bail* for a defendant, in any action depending in this court^m.” By statute 5 Geo. II. c. 18. § 2. “no attorney or solicitor shall be capable to continue or be a *justice of the peace* in *England* or *Wales*, during such time as he shall continue in the business or practice of an attorney or solicitor.” By other acts of parliamentⁿ, “no attorney or solicitor, or person practising as such, can be a *commissioner of the land-tax*, without possessing one hundred pounds a year.” And it is usual to except attornies, who have embezzled their clients’ money, out of the *insolvent debtors’ acts*.

Lastly, by the statute 12 Geo. II. c. 13.^o “no attorney or solicitor, who shall be a *prisoner* in
“any

^m See also Doug. 466.

II. c. 3. § 87, &c.

ⁿ See the statute 30 Geo.

^o § 9.

“ any gaol or prison, or within the limits, rules, or
 “ liberties thereof, shall during his confinement, in
 “ his own name, or in the name of any other attorney
 “ or solicitor, sue out any writ or process, or *com-*
 “ *mence* or *prosecute* any action or suit in any courts
 “ of law or equity; and all proceedings in such
 “ actions or suits shall be void and of none effect:
 “ And such attorney or solicitor, so commencing or
 “ prosecuting any action or suit as aforesaid, shall be
 “ struck off the roll, and incapacitated from acting as
 “ an attorney or solicitor for the future: And any at-
 “ torney or solicitor, permitting or empowering any
 “ such attorney or solicitor as aforesaid, to com-
 “ mence or prosecute any action or suit in his name,
 “ shall be punished in like manner. Provided never-
 “ theless, that nothing in the said act contained,
 “ shall extend, or be construed to extend, to prevent
 “ any attorney or solicitor so confined as aforesaid,
 “ from carrying on or transacting any suit or suits,
 “ commenced before the confinement of such attor-
 “ ney or solicitor as aforesaid.” This statute has
 been held to relate only to the *prosecuting*, and not
 to the *defending* of suits^a: And an attorney, when
 in prison, may sue by attachment of privilege, for a
 debt of his own^r. So where, after an action com-
 menced by an attorney, he became a prisoner, and
 then the bail-bond was assigned, and he being still a
 prisoner,

^a § 12.

(b). S. C.

^r Barnes, 265. Willes, 288

^r 7 T. R. 671.

prisoner, commenced an action on the bail-bond, this was held to be a continuance of the original suit, commenced before the attorney became a prisoner^s.



Attornies, we have seen, may sue by *attachment* of privilege, and must be sued by *bill*. The *attachment* of privilege, at the suit of an attorney, is in nature of a *latitat*^t: therefore in replying it to a plea of the statute of limitations, the plaintiff must set forth the continuances^u. And an attachment of privilege is not a continuance of a bill of Middlesex, so as to avoid the statute of limitations^v.

In suing it out^w, the rule is that “every attorney
 “ shall leave a *præcipe* with the signer of the writs,
 “ containing the defendants’ names, not exceeding
 “ four in each writ, with the return, and day of signing such writ, and the agent’s or attorney’s name
 “ who sued out the same: and that all such *præcipes*
 “ shall be entered on the roll, where the *præcipes* of
 “ *latitats*, and all other writs issuing out of this
 “ court, are entered; and the officer that signs the
 “ writs in this court, shall not sign such attachment, till a *præcipe* be left with him for that purpose.”

^s Barnes, 46.

S. C. but see 1 Wils. 167.

^t 1 Show. 367. and see Append. Chap. XIII. § 4. 6. 8.

^v 8 T. R. 662. but see Willes, 259. (a).

^u *Ante*, 92. Carth. 144.

^w Append. Chap. XIII. §

1 Show. 366. 2 Salk. 420. 3. 5.

pose^x.” But when an attorney sues by attachment of privilege, his name need not be indorsed on the writ; for the 2 Geo. II. c. 23. § 22. which requires the name of the plaintiff’s attorney to be indorsed on the writ, only extends to cases where the attorney sues for another person^y: And an attorney plaintiff may sue by common process, and indorse his own name on the copy, as the attorney, and may afterwards declare by another attorney^z. If an attorney sue by attachment of privilege, for words spoken in *Wales*, and the venue be laid there, and the plaintiff do not recover a verdict for ten pounds, it may be suggested on the roll, that the defendant was resident in *Wales*, &c. in order to entitle the defendant to enter a nonsuit, under the statute 13 Geo. III. c. 51.^a: But if the venue had been laid in *Middlesex*, it might have made a difference^a.

An attorney was formerly permitted to hold the defendant to special bail, upon an attachment of privilege, for fees or disbursements, however trifling^b. But now, since the statutes for preventing frivolous and vexatious arrests, the defendant cannot be arrested and holden to special bail, upon an attachment of privilege, or any other process, unless the cause of action amount to ten pounds or upwards: Where it is under that amount, the defendant must be

^x R. H. 20 Geo. II.

^a 6 T. R. 500.

^y 4 T. R. 275.

^b R. M. 1654. § 9. Gilb.

^z 7 T. R. 35.

K. B. 246. Gilb. C. P. 36.

be served with a copy of the process, and notice to appear, as in other cases.

The time allowed for declaring upon an attachment of privilege, is the same as upon a bill of Middlesex or *latitat*, &c. And if an attorney sue out an attachment of privilege, and deliver or file his declaration, and give notice thereof, four days exclusive before the end of the term wherein the attachment is returnable, the defendant must plead, as of that term; the plaintiff having entered a rule to plead, and demanded a plea: but if he do not declare within that time, the defendant may imparl to the next term; and if he do not declare before the essoin-day, the defendant will have an imparlance to the term following ^d.

The *bill* against an attorney is a complaint in writing, describing the defendant as *being present in court* ^e; and generally concludes with a *prayer of relief*, though the declaration upon the bill is not demurrable for want of it ^f. Formerly, the bill against an attorney could only have been filed in term-time, *sedente curiâ*, and not in vacation ^g: But
now

^c For the beginning of a declaration, at the suit of an attorney, see Append. Chap. XIII. § 10.

^d R. M. 5 Ann. 3. a. Gilb. K. B. 346.

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^e 1 Saund. 28. 202. 2 Saund. 415. and see Append. Chap. XIII. § 11, 12.

^f Andr. 247.

^g 2 Salk. 544. 12 Mod. 163. Gilb. K. B. 346.

2 N

now it may be filed in vacation, as well as in term-time^h; and where the cause of action arises after term, there should be a special *memorandum*, stating the day of bringing the bill into the office of the clerk of the declarationsⁱ. If a bill however, filed against an attorney in vacation, be entitled of the preceding term, and the defendant plead the statute of limitations, he may shew when it was in fact filed^k. The bill against an attorney was entitled of the term generally, being before the cause of action accrued, and the court on motion allowed it to be amended, after a writ of error brought, by inserting a special *memorandum* of the day of filing the same; and gave the plaintiff leave to carry in a new roll, agreeable to the amended bill; and to make the transcript conformable to such new roll, on payment of costs^l. But such an amendment cannot be made, after the proceedings are entered on record, without leave of the court^m.

In practice it is usual to file the bill, on treble-penny stamped parchment, with the clerk of the declarationsⁿ, in the King's Bench office; and to deliver a copy of it, on treble-penny stamped paper, to

^h Doug. 313. 5 T. R. 173. and see 8 T. R. 643, 4.

ⁱ 5 T. R. 325. Append. Chap. XIII. § 13.

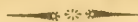
^k Peake Cas. N. Pri. 209.

^l 7 T. R. 474.

^m *Id. ibid.*

ⁿ This officer is appointed to receive and make an entry of declarations and bills filed in this court; to deliver out the former, and to file and keep

to the defendant, or his known agent^o, with notice thereon to plead in four days; which notice has been deemed sufficient, though he reside more than twenty miles from *London*^p: Or if the defendant's name and place of abode be not entered in the master's book kept for that purpose, a copy of the bill may be stuck up in the office; although his name and place of abode be entered in the book containing a list of certificates^q. And if the bill be filed, and a copy thereof delivered, four days exclusive before the end of the term, including Sunday, the defendant must plead as of that term; the plaintiff having entered a rule to plead, and demanded a plea: but if the bill be not filed, and copy delivered, within that time, the defendant is entitled to an imparlance^r: And where the defendant was served with a copy of the bill, before the bill itself was filed, the proceedings were set aside for irregularity^s. The rest of the proceedings, by and against attornies, are the same as in other cases.



The remedy given by law to an attorney, for recovery of his bill of costs, is an action of *assumpsit*^t.

But

keep the latter; for which he is entitled to a fee of two shillings *per* term, from every attorney. R. M. 15 Car. II. reg. 3. R. E. 19 Car. II.

^o Imp. K. B. 516. But such agent is not bound to accept it. *Per Cur.* E. 39 G. III.

^p 5 T. R. 369.

^q ——— *v. Hough one, &c.* T. 42 G. III.

^r R. M. 5 Ann. 3. *a.* Gilb. K. B. 346.

^s *Constable v. Edwards*, E. 40 G. III.

^t Cro. Car. 159, 60

But, by the stat. 3 *Jac.* I. c. 7. § 1. "all attornies
 " and solicitors shall give a true bill unto their mas-
 " ters or clients, or their assigns, of all charges con-
 " cerning the suits which they have for them, sub-
 " scribed with their hands and names, before such
 " time as they or any of them shall charge their cli-
 " ents, with any the same fees or charges." Upon
 this statute it was a good plea, to an action brought
 by an attorney for his fees, that no bill had been de-
 livered to the defendant ^u; or the statute might have
 been given in evidence, on *non assumpsit* ^v. But if an
 attorney had delivered his bill to the defendant, after
 the arrest and before the bill filed, it was well
 enough ^w: and this statute did not extend to attornies
 in *inferior* courts, but only to those in the courts at
Westminster ^x. It should also seem, that an attorney's
 bill could not have been taxed, unless an action was
 depending thereon ^y, nor without bringing the
 amount of it into court ^z.

To remedy these manifold inconveniencies, it
 was enacted, by the statute 2 *Geo.* II. c. 23. § 23.
 (made perpetual by the 30 *Geo.* II. c. 19. § 75.)
 that

^u 3 *Keb.* 118. 514. *T.* 1 *Str.* 633. *Cas. Pr. C. B.*
Raym. 245. 3 *Salk.* 19. 27. *S. C.*

S. C. but see *Carth.* 57. ^x *Carth.* 147. 1 *Show.* 96.
 1 *Show.* 48. *Comb.* 126. *S. C.* 1 *Salk.* 86. *S. C.*

^v 1 *Show.* 338. *Bul. N.* ^y 1 *Salk.* 332.
Pr. 145.

^z 2 *Vez.* 451, 2.

^w 1 *Lil. P. R.* 145 but see

that “ no *attorney* of the court of King’s Bench,
 “ Common Pleas, or Exchequer, &c. nor any *solici-*
 “ *tor* in Chancery, &c. shall commence or maintain
 “ any action or suit, for the recovery of any fees,
 “ charges, or disbursements, at law or in equity,
 “ until the expiration of one month or more, after
 “ such attorney or solicitor respectively shall have
 “ delivered unto the party or parties to be charged
 “ therewith, or left for him, her or them, at his, her
 “ or their dwelling-house, or last place of abode ^a,
 “ a bill of such fees, charges, and disbursements ^b,
 “ written in a common legible hand, and in the
 “ *English* tongue, except law-terms and names of
 “ writs, and in words at length, except times and
 “ sums; which bill shall be subscribed with the
 “ proper hand of such attorney or solicitor respec-
 “ tively.

“ And upon application of the party or parties
 “ chargeable by such bill, or of any other person
 “ in that behalf authorised, unto the Lord High
 “ Chancellor or Master of the Rolls, or unto any of
 “ the courts aforesaid, or unto a judge or baron
 “ of any of the said courts respectively, in which
 “ the business contained in such bill, or the greatest
 “ part thereof in amount or value, shall have been
 “ transacted ^c; and upon the submission of the said
 “ party

^a Leaving it at the compt-
 ing house is not sufficient. 2
 Bos. & Pul. 343

^b Barnes. 243. *Id.* 123.

^c 1 Salk. 89. but see 2 Bar-
 nard. 182. Barnes, 122.

“ party or parties, or such other person authorised
“ as aforesaid, to pay the whole sum that upon tax-
“ ation of the said bill shall appear to be due, to the
“ said attorney or solicitor respectively; it shall and
“ may be lawful for the said Lord High Chancellor,
“ Master of the Rolls, or any of the courts aforesaid,
“ or for any judge or baron of any of the said courts
“ respectively, and they are thereby required, to refer
“ the said bill, and the said attorney’s or solicitor’s
“ demand thereupon, although no action or suit
“ shall be then depending in such court, touching
“ the same, to be taxed and settled by the proper
“ officer of such court, without any money being
“ brought into the said court for that purpose: and
“ if the said attorney or solicitor, or the party or
“ parties chargeable by such bill respectively, hav-
“ ing due notice, shall refuse or neglect to attend
“ such taxation, the said officer may proceed to tax
“ the said bill *ex parte*; pending which reference
“ and taxation, no action shall be commenced or
“ prosecuted, touching the said demand.

“ And upon the taxation and settlement of such
“ bill and demand, the said party or parties shall
“ forthwith pay to the said attorney or solicitor
“ respectively, or to any person by him authorised
“ to receive the same, that shall be present at the
“ said taxation, or otherwise unto such other per-
“ son

“ son or persons, or in such manner, as the re-
“ spective courts aforesaid shall direct, the whole
“ sum that shall be found to be or remain due there-
“ on; which payment shall be a full discharge of the
“ said bill and demand: and in default thereof, the
“ said party or parties shall be liable to an attach-
“ ment or process of contempt, or to such other
“ proceedings, at the election of the said attorney or
“ solicitor, as such party or parties was or were be-
“ fore liable unto.

“ And if upon the said taxation and settlement,
“ it shall be found that such attorney or solicitor
“ shall happen to have been over-paid, then the said
“ attorney or solicitor respectively shall forthwith
“ refund, and pay unto the party or parties entitled
“ thereunto, or to any person by him, her or them
“ authorised to receive the same, if present at the
“ settling thereof, or otherwise unto such other per-
“ son or persons, or in such manner, as the respec-
“ tive courts aforesaid shall direct, all such money
“ as the said officer shall certify to have been so
“ overpaid; and in default thereof, the said attorney
“ or solicitor respectively shall, in like manner, be
“ liable to an attachment or process of contempt, or
“ to such other proceedings, at the election of the
“ said party or parties, as he would have been sub-
“ ject unto, if that act had not been made.

“ And

“ And the said respective courts are thereby authorised, to award the *costs* of such taxations to be paid by the parties, according to the event of the taxation of the bill; that is to say, if the bill taxed be less, by a *sixth* part, than the bill delivered, then the attorney or solicitor is to pay the costs of the taxation; but if it shall not be less, the court, in their discretion, shall charge the attorney or client, in regard to the reasonableness or unreasonableness of such bill.”

But by the 12 *Geo.* II. c. 13. § 5. “ it shall and may be lawful to and for every attorney, clerk in court, and solicitor, to write his bill of fees, charges, and disbursements, with such *abbreviations* as are now commonly used in the *English* language; any thing in any former law to the contrary notwithstanding.” And by § 6. “ the said act of the second year of his present majesty, for the better regulation of attornies and solicitors, or any clause, matter or thing therein contained, shall not extend to any bill of fees, charges, and disbursements, due from any attorney or solicitor, to any other attorney or solicitor, or clerk in court; but every such attorney, solicitor, or clerk in court, may use such remedies, for the recovery of his fees, charges, and disbursements, against such other attorney or solicitor, as he might have done before the making of the said act.”

Upon

Upon the latter clause, there is a case in *Wilson's Reports*^d, where a judge of this court having made an order, to refer an *agent's* bill to be taxed, and the master not having obeyed it, the court was applied to, and held that the order was irregular; the master declaring, that he had never taxed a bill for agency. But it is now the uniform practice of both courts^e, to refer an agent's bill to be taxed, upon the defendant's bringing into court the sum claimed by the plaintiff. It is not necessary however, that such a bill should be signed or delivered, before the commencement of an action^f. And where business has been done by an attorney, for a client who afterwards becomes himself an attorney, the former need not deliver a bill signed, in order to recover his costs^g.

If the whole bill be for *conveyancing*^h, it cannot be taxed. But if any part of an attorney's bill be for business done in court, the bill must be delivered a month before the action is brought, otherwise the plaintiff cannot recoverⁱ. And where an attorney had delivered two separate bills, one of which was for fees and disbursements in causes, and the other
for

^d 1 Wils. 266.^e 1 Esp. Cas. *Ni. Pri.* 420.^f Doug. 199, 200. and the cases there cited, *in notis.*
Groome v. Symonds, E. 35 G.^h M. 12 Geo. II. *Anon.*
K. B. Barnes, 141, 2. C. B.
and see Bul. *Ni. Pri.* 145.

III.

ⁱ 6 T. R. 645. and see^f Doug. 199. *in notis.*
Peake Cas. *Ni. Pri.* 1, 2.Peake Cas. *Ni. Pri.* 1, 2. 3 Esp. *Ni. Pri.* 149, 2 Bos^g 1 Esp. Cas. *Ni. Pri.* 221.

& Pul. 343.

for making conveyances, a rule was made for taxing both ^k. And so, where it was moved that the master might be directed to tax those articles in an attorney's bill, which related to conveyancing and parliamentary business, the rest being for management of causes in the court of King's Bench, Lord *Mansfield* said there was no doubt but the master might tax the whole; that he recollected a case, where the fees paid to a proctor, for business done in the ecclesiastical court, made part of the bill; and it was determined, that as the whole bill had been referred to the master, he might tax that part of it ^l. The court will refer an attorney's bill to be taxed, though all the business was done at the quarter-sessions ^m; and in such case, an action cannot be maintained for the amount of the bill, unless it be signed, and delivered a month before the bringing of the action ⁿ. al

Where it is necessary to deliver a bill of costs, it must be left with the client, and not taken back again ^o. But it is not necessary for the *executor* or *administrator* of an attorney, to deliver a bill of costs, for business done by his testator or intestate, before the commencement of an action ^p; the statute

2 Geo.

^k Say. Rep. 233. Say. Cas. N. Pri. 137. S. C.
Costs, 320. S. C.

^o 1 H. Blac. 290.

^l Doug. 199. *in notis*.

^p 1 Barnard. K. B. 435.

^m 4 T. R. 496. but see *Id.* Andr. 276. Cas. Pr. C. B.
124. Barnes, 122. *contra*. 58.

ⁿ 5 T. R. 694. 1 Esp.

2 *Geo. II. c. 23. § 23.* being confined to actions brought by the attorney himself, and not extending to his personal representatives. And in the court of Common Pleas, they will not suffer such a bill to be taxed^q: But in the court of King's Bench it is otherwise^r; for there, the bill may be referred to be taxed, on the defendant's undertaking to pay what is due. An attorney delivered his bill, and after his death application was made to tax it, and above a sixth part was taken off; it was moved that the executrix might pay the costs, but the court held she should not; for the words of the act, 2 *Geo. II. c. 23. § 23.* impose them upon the attorney or solicitor only, and the executrix is not to blame, if she stand upon his bill, or make out one from his books^s.

Before an attorney's bill has been settled and paid, it may be taxed, as a matter of course, at any distance of time^t. But after it has been settled and paid, and the payment has been long acquiesced under, the court will not refer it to be taxed *as a matter of course*^u. So, where a bond had been given for the debt five years before, and the vouchers had been delivered up, the court would not refer the bill to be taxed; saying, an attorney

^q Barnes, 119, 122.

327.

^r 1 Salk. 89. 2 Str. 1056.

^t *Per Cur. T.* 34 *Geo. III.*

Say. Costs, 324, 5.

^u Say. Costs, 323. Doug.

^s 2 Str. 1056. Say. Costs, 199.

attorney at this rate could never be safe ^v. And it is a general rule, that an attorney's bill cannot be taxed, at the trial of an action brought upon it, nor after verdict ^w; for if the business was really done, (which must be proved at the trial,) the delay of the defendant, for more than a month, in objecting to the *quantum*, is an admission that he thinks it to be reasonable. But though an attorney's bill has been settled and paid, yet the court, *under special circumstances*, will refer it to be taxed; for the client may by affidavit shew that the business charged was never performed, or that the charges are fraudulent: And where that is the case, neither payment, nor a release, nor a judgment for the money due, will preclude the court from having the bill taxed ^x. It may also be taxed, though there was a special agreement, between the attorney and his client, that the former should be paid for his time, at a certain rate by the day, besides his expences ^y; or though he has obtained a warrant of attorney from his client, for confessing judgment for the money due upon his bill, and has entered up judgment thereupon ^z.

The statute 2 *Geo. II. c. 23. § 23.* only requires the delivery of a bill, for the *bringing* of an action; and

^v Cas. Pr. C. B. 109. Pr. Reg. 37. S. C. but see 1 Barnard. 144, 5.

^w Doug. 199. K. B. Barnes, 124. C. B. and see 2 Bos. & Pul. 237.

^x Say. Costs, 323. Doug. 199. S. P. and see 2 Atk. 295.

^y Say. Costs, 321. 2 Barnard. K. B. 164. *contra*.

^z Say. Costs, 322.

and therefore though an attorney cannot bring an action on his bill, till it has been delivered a month, that circumstance is not necessary to enable him to *set it off*. But he must not produce it at the trial by surprise: It is sufficient in such case, to deliver the bill time enough, for the plaintiff to have it taxed before the trial ^a. The delivery of a former bill is conclusive evidence against an increase of charge in a subsequent bill, on any of the *items* contained in it, and strong presumptive evidence against any additional *items*; but if there were any real errors or omissions in the former bill, they may be rectified ^b.

If an attorney refuse to deliver a bill to his client, the latter may compel him, by taking out a summons before a judge; and if the attorney, on being served therewith, do not attend, an order will be made for delivering it within a reasonable time. If he still neglect to deliver it, the order should be made a rule of court; and on serving the same, and making affidavit thereof, the court on motion will grant an attachment. The bill being delivered, the client may apply for a judge's summons, to shew cause why it should not be referred to the proper officer to be taxed; upon which an order will be made, the client undertaking to pay what shall appear to be due upon such taxation. If the attorney do not attend, an order will be made

^a Doug. 199. *in notis.* 1 ^b 1 Ros. & Pul. 49.
Esp. Cas. NE. *Pr.* 499. S. P

made of course ^c. But in the Common Pleas, the client cannot have a summons for delivery of the bill, and taxing it, together ^d. It was formerly necessary, in this court, to have three appointments, in case the attorney did not attend, before the master could proceed *ex parte*: But by a late rule ^e, “on every appointment to be made by the master, the party on whom the same is served, shall attend such appointment, without waiting for a second; or in default thereof, the master shall proceed *ex parte*, on the first appointment.”

If a sixth part of the bill be taken off, the attorney is to pay the costs of taxation; but if less, the costs are in the discretion of the court ^f. In the exercise of this discretion however, the courts are governed by the statute: And accordingly, the costs of taxation have been always reciprocally given to the client or attorney, as a sixth part has, or has not been taken off ^g. Where an attorney has regularly delivered a bill signed, he may give a copy of it in evidence, without proof of notice to produce the original ^h.

To

^c The court of common pleas will not stay proceedings in an action on an attorney's bill, brought subsequent to the order of the judge of another court for its taxation, but previous to its being taxed. 1 Bos. & Pul. 365.

^d Barnes, 126. C. B.

^e H. 32 Geo. III. 4 T. R. 580.

^f See the statute.

^g Barnes, 118. 147, 8. but see 2 H. Blac. 357.

^h 2 Bos. & Pul. 237. 3 Esp. Cas. *N. Pri.* 167. S. C.

To assist the attorney, in recovering his costs, he has a *lien* for the amount of his bill, upon the deeds, papers and writings in his hands, belonging to his clientⁱ; and until that be paid, the court will not order them to be delivered up^k. Nor can an attorney be *changed* by his client, without leave of the court, or order of a judge, on payment of his bill, to be taxed by the proper officer^l. An attorney has also a *lien* on the money recovered by his client, for his bill of costs^m. If the money come to his hands, he may retain it, to the amount of his bill; he may stop it *in transitu*, if he can lay hold of it: If he apply to the court, they will prevent its being paid over, till his demand is satisfiedⁿ. And Lord *Mansfield* declared he was inclined to go still further, and to hold, that if the attorney give notice to the defendant, not to pay the money recovered by his client, till his bill be satisfied, a payment by the defendant, after such notice, would be in his own wrong, and like paying a debt which has been assigned, after notice^o.

Accordingly

ⁱ 4 T. R. 124. Doug. 104, 2 Vez. 25. 2 Str. 1126.
5. but see *Id.* 194. n.

^k 1 Lil. P. R. 142. 3 T. 3 Bur. 1313. as to the lien of
R. 275. officers of the court, and their
remedy for the recovery of
costs.

^l 1 Lil. P. R. 141. Doug. 104. 1 H. Blac.
217. ⁿ Doug. 122.

^m 3 Atk. 720. 4 T. R. 124. 122.
and see 2 P. Wms. 460. ^o Doug. 238.

Accordingly it has been holden, that if the defendant's attorney pay to the plaintiff the debt and costs recovered, after notice from the plaintiff's attorney not to do so, till his bill has been first satisfied, the former is liable to pay over again to the latter, the amount of his lien on such debt and costs of the suit ^p. An attorney has also a lien upon a sum awarded in favour of his client, as well as if recovered by judgment: and if after notice to the defendant, the latter pay it over to the plaintiff, the plaintiff's attorney may compel a re-payment of it to himself; and he will not be prejudiced by a collusive release from the plaintiff to the defendant ^q. So where the defendant applies to set off the debt and costs in one action, against those in another, the court will not suffer it to be done, until the attorney's bill be first discharged ^r. But the court will not go beyond these limits: And therefore where the defendant, not having had any notice to the contrary, compromised the debt and costs with the plaintiff, before his attorney had been paid, the court would not oblige the defendant to pay him ^s. So where the plaintiff, having charged the defendant in execution, died, and the defendant's wife

^p 6 T. R. 361.

^q 1 East, 464.

^r 4 T. R. 123, 4. 6 T. R. 456. 8 T. R. 70. but see

^s Blac. Rep. 826. Say. Costs,

254. S. C. *contra*. and see

1 H. Blac. 23. 217. 2 H.

Blac. 440. 587. 2 Bos. & Pul. 28.

^s Doug. 238.

wife took out administration to the plaintiff, the court ordered the defendant to be discharged out of custody ; saying, that the plaintiff's attorney had no lien on the judgment for his costs ^t.

^t 8 T. R. 407.

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CHAP-

CHAPTER XIV.

Of the BILL against PRISONERS, in the actual or supposed Custody of the MARSHAL; and how far it is considered as the COMMENCEMENT of the Suit.

WHEN a defendant is committed to the custody of the marshal ^a, or has put in bail upon a *cepi corpus* ^b, or *habeas corpus* ^c, the plaintiff, or any other person, may exhibit a *bill*, and declare against him, as a prisoner of the court, in whatever action, and charge him with whatever injury he thinks proper ^d.

Where the defendant is in *actual* custody, he has the privilege of the court, and cannot be compelled to answer elsewhere; therefore if he were not to answer here, none could have remedy against him ^e. And even where he is not in actual custody, yet still, when he appears and puts in bail, he is *supposed* to be in custody of the marshal, and may be proceeded against

^a 7 Hen. VI. 42. 27 Hen. VI. 6. a. 2 Inst. 23. 4 Inst. 352.

72. 2 Bulst. 207, 8.

^c Cro. Jac. 620. 1 Salk.

^d R. E. 15 G. II. Cowp.

^b 31 Hen. VI. 10. 32 Hen. 455.

VI. 4. 21 Hen. VII. 33. ^e 2 Bulst. 123. Carth. 378.

Hob. 264, 5. Cro. Jac. 450. 1 Salk. 1, 2. S. C. 2 Bur.

Godb. 339. Cro. Car. 330. 1051. 1 T. R. 592.

against accordingly. But an appearance alone, without bail, is not sufficient ^f; it being clearly settled, that where the defendant is not in actual custody, no action can be legally commenced against him as a prisoner, until he has filed bail ^g. It is the entry of bail in such case which gives this court jurisdiction ^h: and therefore where no bail is entered for the defendant ⁱ, or where bail is entered for him by a wrong name ^k, or there are several defendants, and no bill is entered for one of them ^l, the proceedings are void, and *coram non judice*. But it is said, that by the practice of this court, though the defendant's bail be not taken and entered till the last day of term, and the bill be put in before, any time that term, it is well enough; yet from the time of the bail, the defendant is answerable as in custody of the marshal, and not before, in strictness of law ^m.

The *bill* against a prisoner is a complaint in writing, and, except where the action is brought for a *trespass* committed in *Middlesex* ⁿ, or other county where the court sits, should allege the defendant to be in custody of the marshal. Where the defendant is

^f 7 Hen. VI. 41. Cro. 694. Cro. Jac. 620. Eliz. 605.

^k Cro. Eliz. 223.

^g 1 Sid. 373. 2 Keb. 368.

^l Poph. 145.

S. C. 1 Vent. 135. 2 Lev.

^m Hob. 70. Cro. Jac

13. 2 Keb. 790. S. C.

384. Jenk. 295. S. C.

^h 1 Vent. 135.

ⁿ Dyer, 118. (a).

· Cro. Eliz. 605. Moor.

is in actual custody, the bill should be filed, on treble-penny stamped parchment, with the clerk of the declarations, in the King's Bench office, before a copy of it is delivered to the defendant, or left for him with the gaoler or turnkey^o. But a declaration against a defendant at large upon *bail* is good, although a bill has not been filed; because, if the bringing of a writ of error, or any other reason, make the filing of a bill necessary, it may be filed at any time^p.

Where the defendant is in the actual or supposed custody of the marshal, upon a bill of *Middlesex* or *latitat*, &c. the *bill* exhibited against him as a prisoner of the court, is considered as the commencement of the suit, and the bill of *Middlesex* or *latitat*, &c. merely as process to bring him into court^q. Such process therefore may be sued out, though the defendant cannot be arrested upon it, before the cause of action^r; and the plaintiff is allowed to give in evidence a cause of action arising after it is sued out, and before the exhibiting of the bill, as well in the case of *bailable* as *serviceable* writs^s. It has been frequently ruled however, that for certain purposes, a bill of
Mid-

^o R. E. 5 W. & M. 1244.

Reg. 3. § 1. (b). 8 Mod. 561. ^r Cro. Eliz. 271. Cro. Jac. 226, 7. 1 Vent. 28. 8 Mod.

^p Say. Rep. 49. 343. 1 Wils. 142. 2 Bur

^q 1 Wils. 40. 144, &c. 967. Doug. 62.

2 Bur. 960. but see 3 Bur. ^s Cowp. 454. 7 T. R. 4

Middlesex or *latitat*, out of this court, may be taken to be in nature of an original writ, in the *Common Pleas* ^t; and a *latitat*, even without a bill of *Middlesex*, if properly issued, and continued on the roll, has been holden to be a good commencement of the suit, to avoid a plea of the statute of limitations ^u, or a *tender* made after suing it out ^v. It was indeed said by *Holt*, Ch. J. that “there is a difference between
 “a civil action, and an action given by a statute; for
 “in the first case, the suing out a *latitat* within the
 “time, and continuing it afterwards, will be sufficient; but in the other case, if the party proceed
 “by bill, he ought to file his bill within time, that it
 “may appear to be upon the record itself ^w :” But upon a writ of error, all the judges in the exchequer-chamber held, that a *latitat* is a kind of original in the King’s Bench ^x. And accordingly, in two subsequent cases ^y, it was holden to be a good commencement of the suit in a penal action. Hence it appears, that a *latitat* may be considered, either as the commencement of the action, or only as process to bring the defendant into court, at the
election

^t Sty. Rep. 156. Carth. 233. ^x 2 Ld. Raym. 883. Cowp. 2 Ld. Raym. 883. 1 Wils. 456.

147. 7 Cowp. 456.

^u *Ante*, 24.

^v Cro. Car. 264. 1 Wils. 141. ^y *Bridges v. Knapton*, and *Hardiman v. Whitaker*, cited in 2 Bur. 950. 3 Bur. 1243 Cowp. 454. 2 East, 574

^w Carth. 23^c

election of the plaintiff^z: Though if it be stated as the commencement of the action, to avoid a *tender*, the defendant may deny that the plaintiff had any cause of action at the time of suing it out^a; or if it be replied to a plea of the statute of limitations, the defendant, in order to maintain his plea, may aver the real time of suing it out, in opposition to the *teste*^b. The commencement of the action can only be proved by the production of the writ itself, or an office-copy of it: but the declaration may be given in evidence, to establish the fact of an existing suit at the time of its being delivered.” 4 Esp. Cas. *Ni. Pri.* 100.

Where the proceedings are entered with a general *memorandum*, which relates to the first day of term, and the cause of action appears in *evidence* to have arisen after the first day of term, but before the suing out of the writ, the plaintiff may produce the writ, in order to shew that it was really sued out, subsequent to the cause of action^c. And where, in a similar case, the fact complained of was admitted by the defendant's plea of *son assault demesne*, the court held it to be well enough; for the plaintiff need not give any evidence on this plea, unless to aggravate damages: and the court will not nonsuit him, because it is amendable by a new bill^d. In like manner, where the defendant pleads *plene administravit*^e, or a *tender*^f, he has a right to set up the fact against the fictitious relation, in order to support his plea.

After

^z Bul. *Ni. Pri.* 151. 1 1241. S. C.
Wils. 146. and see 8 T. R. ^d 2 Str. 1271. 1 Wils. 171
628. S. C.

^a 1 Wils. 141.

^c 1 Sid. 432.

^b 2 Bur. 950.

^f Cowp. 456. but see 4 Esp.

1 Blac. Rep. 212. 3 Bur. Cas. *Ni. Pri.* 72

After verdict, a general *memorandum*, by which the cause of action appears to have arisen after the action brought, has been allowed to be rectified by an examination of the real time of filing the *bill*^g, or of the *bail*^h, to which the bill relates; but the better and more usual way is to file a *new bill*, and amend by itⁱ. In a late case^k, the court gave the plaintiff leave to amend the bill filed, by inserting a special *memorandum* of the day of filing the same, and to carry in a new roll agreeable to the amended bill, and to make the transcript conformable to the new roll, even after a writ of error brought, on payment of costs.

g 1 Sid. 373. 2 Keb. 368. S. C. but see Carth. 113.
 S. C. 1 Vent. 135. 2 Lev. 13. i 1 Str. 583. 2 Str. 1151.
 2 Keb. 790. S. C. and see 1162. 1 Wils. 104. but see
 Carth. 114. 1 Show. 147. 6 T. R. 129.
 S. C. k 7 T. R. 474. 1 East, 135.
 h 1 Sid. 432. 2 Lev. 176. S. C. cited.
 T. Jon. 87. 3 Keb. 693.

CHAPTER XV.

Of PRISONERS in the actual CUSTODY of the MARSHAL; and their REMOVAL thither by HABEAS CORPUS: and of the PROCEEDINGS in ACTIONS against PRISONERS, in the actual CUSTODY of the MARSHAL or SHERIFF, &c. previous to the PLEA.

PRISONERS in the *actual* custody of the marshal are detained there on a *civil* or *criminal* account; and on a civil account, they are committed to his custody, on the return of *cepi corpus et paratum habeo*, on a render in discharge of bail, or on the return to a *habeas corpus*^a.

The writ of *habeas corpus*, in *civil* cases, is a judicial writ, issuing out of the King's Bench office^b, commanding the sheriff, or other officer to whom it is directed, to have the body of the defendant, together with the day and cause of taking and detaining him, before the court or a judge, on a day *certain* in term-time or *immediate*, to *answer* or *satisfy* the plaintiff, or generally, to *do* and *receive* what the court or judge shall consider of

^a For the rules and orders by the prisoners, see R. M. made for the better govern- 3 G. II. 3 R. Dec. 17, 1739
ment of the King's Bench 4 G. II.
prison, and the fees payable ^b 2 Bur. 777.

of him. Hence it is called, according to the subject-matter, a writ of *habeas corpus ad respondendum*, *ad satisfaciendum*, or *ad faciendum et recipiendum*^c; though the latter is more commonly called a *habeas corpus cum causâ*: And it is grantable of common right, at all times, whether in term or vacation, without any motion in court^d.

The writ of *habeas corpus cum causâ*^e lies for the defendant to remove himself, or for the plaintiff to remove him, from the custody of the sheriff or other officer by whom he was arrested, into the custody of the marshal. At common law, when a defendant was arrested, and detained or charged in custody of the sheriff or other officer, for want of bail, upon mesne process, if the plaintiff did not, within two terms, cause him to be brought up, by writ of *habeas corpus cum causâ*, and committed, so that he might declare against him in the custody of the marshal, the defendant was entitled to his discharge, on common bail or appearance^f. This mode of proceeding was altered by the statute 4 & 5 W. and M. c. 21. which enables the plaintiff to declare against the defendant in custody of the sheriff, or other officer who arrested him^g. He is still at liberty, however.

to

^c *Off. Brev.* 110. 112. *Thes.* 5 W. & M. *Reg.* 3. § 1. (*a*).
Brev. 131. 1 Wils. 120. 2 Bur. 1051. 1

^d 1 Lev. 1. 2 Mod. 306. T. R. 192.

^e *Append. Chap.* XV. § 2. ^f *Post.* 309.

^g R. M. 1654. § 11. R. E.

to remove the defendant, by writ of *habeas corpus cum causâ*, from the custody of the sheriff or other officer, into the custody of the marshal, at any time before or after judgment ^h.

This writ also lies for the *bail* of the defendant to bring him up, and surrender him in their discharge; and that, whether the defendant be in custody in a *civil* suit, or on a *criminal* account ⁱ. And under it, the court will either remand the defendant to his former custody, or commit him to the custody of the marshal. Where the defendant is in custody on a *criminal* account, the court will remand him to his former custody ^j. * And where an impressed man, not being liable to be taken out of the king's service by any process, other than for some criminal matter, was brought up by the keeper of the Savoy, to be surrendered in discharge of his bail, the court first committed him to the custody of the marshal, and then ordered him to be delivered *instante* to the keeper of the Savoy; which was done, and an *exoneretur* entered on the bail-piece ^k. In general, however, the court will commit the defendant, as their prisoner, to the custody of the marshal; and he may be so committed, though he were previously charged in another custody, upon an

^h 1 Salk. 354. 2 Str. 1262. ^j 2 Str. 1217. but see 4 Bur Say. Rep. 154. 3 Bur. 1875. 2034.

ⁱ 7 T. R. 226.

^k 1 Bur. 339.

* From the *Addenda to the London edition*. "In such case, he must be brought up by a *habeas corpus*, issued on the crown-side of the court; on which side also must be taken out the subsequent rule for his surrender in the action, his commitment, *pro forma* to the marshal, and his re-commitment to his former custody, charged with the several matters against him." 3 East, 232.

an *extent* or *information*, or for a *contempt* in not paying the king's debt; so as the civil action appears to have been commenced before the other proceedings, and the court are satisfied that it is for a just debt, and the application really made by the bail: For by the 25 Edw. III. c. 19. "the king's debtors" shall not be protected from the proceedings of "their other creditors against them¹." The attorney general, however, may have a *habeas corpus* to remand the defendant^m.

The writ of *habeas corpus cum causâ* should be directed to the sheriff, or other officer in whose custody the defendant is detained; and there is an old ruleⁿ, directing it to be made returnable in court, at a day certain in term, unless directed to the sheriffs of London or Middlesex, or unless it be to deliver over the defendant in discharge of his bail. But this rule having fallen into disuse, the writ is now made returnable before the chief justice at his chambers, *immédiatè*; and under it the defendant should be brought in custody, according to the writ, in due and convenient time^o, without being permitted to wander abroad, under pretence of such writ^p.

When the defendant, being charged with process

¹ 1 Salk. 353. 1 Str. 641. 1

Wils. 248. 1 Bur. 339.

^m 1 Wils. 248.

ⁿ R. M. 1654. § 7.

^o 3 Bur. 1875, 6.

^p R. M. 1654. § 7. and see R. M. 28 Car. II.

cess issuing out of this court, is removed *before* declaration, from the custody of the sheriff or marshal, to the *Fleet* prison, the plaintiff cannot proceed further here; but must either declare against him in the *Common Pleas*, or remove him into the custody of the marshal, by writ of *habeas corpus ad respondendum*^a, in order to charge him with a declaration^r. This writ also lies for a *third* person, to remove a defendant from the *Fleet*, or prison of an *inferior* court, in order to charge him with a declaration in this court^s. But then, there must be something to charge him with, either in the body of the *habeas corpus* or return, or ready in court upon bringing him up^t. The writ of *habeas corpus ad respondendum* should be directed to the warden of the *Fleet*, or keeper of an *inferior* prison, returnable at a day certain in court; and will be as good cause of detainer, as a writ of *capias ad respondendum*^u. But this writ does not lie for the plaintiff in an inferior court, to remove the body of the defendant into this court, to answer to a new action here, for the same debt^v.

When

^a Append. Chap. XV. § 3, 4. R. 4. Sty. P. R. 330. 1 Mod. 235. 2 Mod. 198. S. C. 1 Salk. 351. 2 Str. 936. 2 Bur. 511. by which it seems that the defendant, after such removal, may put in and justify bail in either court.

^r Bac. Abr. 2. 2 Lil. P.

^s R. 4. Sty. P. R. 330. 1 Mod. 235. 2 Mod. 198. S. C. 1 Salk. 351. 2 Str. 936. 2 Bur. 511.

^t 2 Lil. P. R. 356.

^u R. M. 1654. § 7.

^v Cowp. 115.

When the defendant is removed *after* declaration, from the custody of the sheriff or marshal, to the *Fleet* prison, the plaintiff should proceed to judgment against him in this court, and then remove him into the custody of the marshal, by writ of *habeas corpus ad satisfaciendum*, in order to charge him in execution ^w. And so *vice versâ*, if a prisoner in the *Fleet*, charged with a declaration in the Common Pleas, remove himself by *habeas corpus* to the custody of the marshal, the plaintiff must proceed to judgment in the Common pleas, and then carry him back by *habeas corpus ad satisfaciendum*, to charge him in execution ^x. This writ should be directed and returnable in the same manner as the writ of *habeas corpus ad respondendum*; and the number of the judgment-roll indorsed thereon, by the attorney who sues it out ^y.

Under one or other of these writs, a defendant may be removed, from any *civil* custody, into that of the marshal. If he be already in custody of the *sheriff*, under the process of this court, he has only to sue out a writ of *habeas corpus cum causâ*; under which he will be removed, as a matter of course, on paying the usual fees: and he may be removed,
in

^w 1 Sid. 100. R. T. 2 Geo. 1. R. T. 2 G. I. (b).
^x 1. (b). 2 Str. 1153. Barnes, R. M. 1654. § 7. R. T. 2
 385. and see Append. Chap. Geo. 1. (b).
^y XV. § 6.

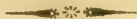
in like manner, from the prison of an *inferior* court. But if he be in custody of the *sheriff*, under the process of the *common pleas* or *exchequer*, a bailable writ must be taken out against him in this court, and lodged in the sheriff's office, as a foundation for his commitment on the *habeas corpus*. Where he is in custody of the *warden* of the *Fleet*, he may be removed in *term*-time, by writ of *habeas corpus ad respondendum*; upon which he must be charged in court, with a declaration in a bailable action: In *vacation*, a bailable writ must be taken out against him, and bail above put in thereon, in this court; and then a writ of *habeas corpus cum causâ* must be brought, in order to surrender him in discharge of his bail.

If a prisoner be removed from the custody of the warden of the *Fleet*, to the king's bench prison, by writ of *habeas corpus*, he must remain in such prison, and shall not be set at liberty, until he hath paid the prison fees due to the warden of the *Fleet* ². On a removal by writ of *habeas corpus ad respondendum*, the prisoner cannot be removed elsewhere, till he has answered to the cause here ³. And it is a general rule, applicable to all writs of *habeas corpus*, that “ every prisoner, who, by virtue thereof, shall
 “ be committed to the custody of the marshal,
 “ shall remain there for *two* days next after such
 “ commitment,

² R. H. 14 Car. I.

³ 1 Salk. 350.

“ commitment, notwithstanding any other writ of
 “ *habeas corpus* to the said marshal delivered and
 “ allowed ^b. ”



A prisoner in the actual custody of the marshal, may be proceeded against by the *same* plaintiff, at whose suit he was arrested, or *charged* in custody by a *third* person. And the *same* plaintiff may proceed against him, either for the cause of action expressed in the process, or for a *different* cause of action.

Where a prisoner is committed to the custody of the marshal, on a bill of *Middlesex* or *latitat*, &c. or on an attachment of privilege ^c, the plaintiff must file a *bill* ^d against him, as a prisoner of the court, with the clerk of the declarations in the king's bench office; and deliver a copy of it, on treble-penny stamped paper, to the defendant or *turnkey* at the king's bench prison. And this may now be done in vacation, as well as in term-time ^e. Where a prisoner is in custody upon process by *original*, it is sufficient to deliver a *declaration* thereon, without filing a *bill* against him ^f.

If

^b R. H. 5 W. & M.

^c Cro. Car. 330.

^d Append. Chap. XV. § 7.

^e 8 T. R. 643. 2 Bur. 1051,

2. *contra*.

^f For the mode of commencing actions, and proceeding in

the common pleas, against prisoners in the *fleet*, see stat. 13 Car. II. st. 2. c. 2. § 5. stat. 8 & 9 W. III. c. 27. § 13. R. M. 1654. § 13. R. H. 14 & 15 Car. II. reg. 3. R. H. 8 G. II. reg. 1.

If a prisoner be turned over from one custody to another, it is considered as a *continuance* of the same imprisonment ^ε. Therefore where a defendant, having been taken or charged in custody of the sheriff or other officer by mesne process, is afterwards removed by *habeas corpus*, and committed to the custody of the marshal, the proceedings against him are to be reckoned, from the time of his having been so taken or charged in custody ^h. With this exception, it is a general rule, that where the defendant is committed to the custody of the marshal, upon a *cepi corpus* ⁱ or *habeas corpus* ^k, &c. before declaration, the plaintiff should declare against him, before the end of the term next after such commitment: or in case of a surrender to the marshal in discharge of bail, before the end of the term next after such surrender, and due notice thereof ^l. But the term of the commitment or surrender is to be accounted one, although the defendant was not committed or surrendered till the last day of vacation ^m. The defendant was formerly brought into court by *rule*, in order to be charged with a declaration; there being no occasion for a *habeas corpus*, where it was in the same court:

^ε 1 Bur. 439. 5 T. R. 36. 6 and note (a). 8 Mod. 306.
 T. R. 524. ^k R. M. 16 Car. II. (b). 6
^h R. H. 26 G. III. Mod. 21.
ⁱ R. M. 1654. § 11. R. E. ^l R. H. 26 Geo. III. and ser
 5 W. & M. Reg. 3. § 1. (a). R. T. 1 Ann. Reg. 2.
 6 Mod. 254. R. T. 2 Geo. I. ^m R. T. 2 Geo. I (a)

courtⁿ: But this practice is now disused. And there is no occasion for an *affidavit* of the delivery of the declaration, where the defendant is in custody of the marshal^o.

A prisoner once committed to the custody of the marshal, is liable to be charged with a civil action, either by the *same* plaintiff for a different cause of action, or by a *third* person, so long as he remains in actual custody. For though it be a rule, that a prisoner once supersedeable is always so, yet this holds only with regard to the *same* plaintiff, at whose suit he was in custody, for the original cause of actionⁿ; and even with regard to him, it must be understood with this qualification, that the prisoner is only supersedeable, so long as he remains in the *same* custody, and under the *same* process; for the moment the nature of the custody is changed, the rule ceases. Therefore if a prisoner on mesne process be supersedeable for any irregularity, as for want of the demand of a plea, he cannot take advantage of it, *after* he is charged in execution; supposing he has any opportunity of applying on that ground, *before* he is charged in execution^a. So where a prisoner is supersedeable, for want of filing a bill against him in due time, he waives the irregularity

ⁿ 2 Sel. Prac. 357. 2 Bur. 72.

1051, 2.

^p 2 Bur. 1048.

^o R. E. 5 W & M. reg. 3.

^q 1 T. R. 591

§ 2. (a). and see 2 Bos. & Pul.

irregularity by afterwards pleading ^r. And it has been holden, that a creditor may lawfully enter a detainer against his debtor, who is in fact resident within the walls of the prison, though he be not there by compulsion ^s.

But neither the plaintiff nor a third person can charge a prisoner with a *civil* action, when he is in custody of the marshal, or in any other custody, on a *criminal* account, without leave of the court ^t or a judge. And a prisoner in custody on an *attachment* for a contempt, is holden to be a prisoner in custody on a *criminal* account, within the meaning of this rule ^u. But a person in custody under an attachment, for non-payment of costs, may be charged with an execution in a different action, as a matter of course ^v. And one who is attainted of felony, or even treason, may be charged with a civil action, by leave of the court or a judge; so as it be not to defeat the effect of the

^r 1 East, 77.

^t T. Raym. 58. 1 Sid. 90.

^s 3 T. R. 392. But if the defendant be entitled to his discharge, as having been improperly arrested, whilst he was *privileged* in the first action, he cannot be lawfully detained in custody by a third person. *Stuart & Spence, M.* 43 Geo. III. 3 East, 90.

S. C. 1 Lev. 124. 1 Sid. 154. S. C. 1 Lev. 146. 1 Salk. 354. R. T. 2 Geo. I. (a).

^u Pr. Reg. 325. but see Pr. Reg. 326, 7. Barnes, 380. 2 Blac. Rep. 970. as to *fugitives*, &c.

^v 4 T. R. 316.

the king's pardon, by disabling him from going abroad ^w.

The mode of charging a prisoner with an action in custody of the marshal, in *term*-time, is by filing a bill ^x against him, as being in such custody, and delivering a declaration, which is a mere copy of the bill, to the turnkey. In *vacation*, there was formerly no way to charge him, but by making an entry in the marshal's book in the King's Bench office, that he should remain in custody, at the suit of the intended plaintiff, which was deemed sufficient to charge him, provided he were then in actual custody; for if he were at liberty, he might have been arrested ^y. But in a modern case ^z, where this matter was fully discussed, the court of King's Bench were of opinion, that the right method of charging the defendant with a new suit in *vacation*, is to file a bill as of the preceding term; and then to deliver to, or leave for the defendant in custody, a copy of the declaration, as of the preceding term, and to make an affidavit thereof ^a. And where the defendant is charged in *vacation*, upon a cause of action arising after the last term, there

^w 2 Salk. 500. 7 Mod. 14. 345. 3 Salk. 150.
 153. 2 Ld. Raym. 848. ^z 2 Bur. 1052.
 S. C. *Id.* 1572. 2 Str. 873. ^a *Qu.* as to the *affidavit*;
 S. C. Cas. *temp.* Hardw. 190. which does not seem to be
 1 Blac. Rep. 30. 1 Wils. necessary, where the defend-
 217. Fost. 61. S. C. ant is in custody of the mar-
^x Append. Chap. XV. § 7. shal. *Ante*, 305
^y 6 Mod. 254. 1 Salk. 213,

there should be a special *memorandum*, similar to that against an *attorney* under the like circumstances ^b, stating the day of bringing the bill into the office of the clerk of the declarations.

For preventing however the detainer of prisoners, charged by declarations in the custody of the marshal, where the cause of action against them does not amount to *ten* pounds, it is a rule ^c, “that no declaration shall be sufficient cause of detaining such prisoner in custody, unless an affidavit, that the plaintiff’s cause of action against him does amount to *ten* pounds or upwards, shall be first made and filed with the clerk of the rules, and the sum specified in such affidavit indorsed by him on such declaration, before the same is left with the turnkey.” But this rule is confined to cases where the prisoner is charged with a *new* action; and does not apply, where he is proceeded against by the *same* plaintiff, for the cause of action expressed in the process ^d.

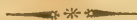
When a bill is filed against a prisoner in custody of the marshal, if a copy of it be delivered for him to the turnkey, *four* days exclusive before the end of the term, a rule to plead given, and a plea demanded, the

^b 5 T. R. 325. and see Appendix. Chap. XV. § 8.

^d Barnes, 75. Pr. Reg. 330. Cas. Prac. C. B. 144. S. C.

^c R. E. 15 G. II. Reg. 3.

the defendant shall plead as of that term; but if the bill be not filed, and the copy delivered, four days exclusive before the end of the term, the defendant may imparl until the next term^e.



Before the making of the statute 4 & 5 W. & M. c. 21. there could have been no declaration in this court, against a defendant in custody of the *sheriff*, or other officer by whom he was arrested; but the plaintiff was obliged to bring a *habeas corpus cum causâ*, and so turn him over to the custody of the marshal, in order to charge him with a declaration^f. But now, by the above statute, which was passed to relieve plaintiffs from the trouble and expence of bringing up prisoners by *habeas corpus*, “if any
“defendant be taken or charged in custody, at the
“suit of any person, upon any writ out of any of the
“courts at Westminster, and imprisoned for want
“of sureties for his appearance, the plaintiff in such
“writ may, before the end of the next term after such
“writ is returnable, declare against such prisoner, in
“the court out of which the writ issued, whereupon
“the

^e R. E. 5 W. & M. Reg. (a). 1 Wils. 120. 2 Bur.
3. (a). 1051. 1 T. R. 192.

^f See the preamble to the 4 & 5 Wils. 120. 1 T. R.
statute; R. M. 1654. § 11. 192.
R. E. 5 W. & M. Reg. 3. § 1.

“ the said prisoner was taken and imprisoned, or
“ charged in custody ; and may cause a true copy
“ thereof to be delivered to such prisoner, or to the
“ gaoler or keeper of the prison or gaol, in whose
“ custody such prisoner shall be or remain: to which
“ declaration the said prisoner shall appear and plead ;
“ and if such prisoner shall not appear and plead
“ to the same, the plaintiff in such case shall have
“ judgment, in such manner as if the prisoner had
“ appeared, and refused to answer or plead to such
“ declaration.”

And by the same statute, § 3. “ in all declara-
“ tions, against any prisoner, detained in prison, by
“ virtue of any writ or process issued out of the
“ court of King’s Bench, it shall be alleged in cus-
“ tody of what sheriff, bailiff, or steward of any
“ franchise, or other person having the return and
“ execution of writs, such prisoner shall be, at the
“ time of such declaration, by virtue of the process
“ of the said court, at the suit of the plaintiffs^h ;
“ which allegation shall be as good and effectual,
“ to all intents and purposes, as if such prisoner or
“ prisoners were in the custody of the marshal.” If
the declaration therefore do not allege, either express-
ly or by implication, at whose suit the defendant is
in

^h Append. Chap. XV. § 9, &c.

in custody, it will be bad on a general demurrerⁱ. This allegation however is only necessary, where the plaintiff proceeds upon a bill of Middlesex or *latitat*, &c. or by *attachment* of privilege.

Upon the statute, a defendant in the actual custody of the sheriff or other officer, may be proceeded against by the *same* plaintiff, at whose suit he was arrested, or by a *third* person: by the former, upon the original *caption*, by the latter upon a subsequent *charge*, and by either of them, upon a *recaption* by virtue of an *escape* warrant^j.

The mode of charging a defendant in the actual custody of the sheriff, &c. for a *bailable* cause of action, is by making an affidavit thereof, and suing out *process*, which should be duly marked or indorsed for bail, and left at the sheriff's office. But if the cause of action be not bailable, the *same* plaintiff, or a *third* person, may proceed against the defendant, as if he were at large, by serving him with a copy of process^k.

When the defendant is taken and detained, or charged in custody of the sheriff, &c. the statute expressly

ⁱ 2 Ld. Raym. 1362. 1 times and mode of proceeding in the common pleas, Wils. 119, 20.

^j For the time of declaring against prisoners in the actual custody of the sheriff, &c. upon a *recaption*, see R. T. 6 Ann. 6 Mod. 21. 254. see R. E. 5 W. & M. reg. 3

^k 1 T. R. 192. For the R. E. 8 Geo. I

expressly provides, that the plaintiff may declare against him, before the end of the *next* term after the process is returnable; and by rule of E. 5 W. & M.¹ if the declaration be not filed within that time, the prisoner shall be discharged on common bail. But a subsequent rule^m having rather ambiguously required, that if the defendant should remain in custody for *two* terms, and the plaintiff should not declare against him within that time, the defendant should be discharged out of custody, after the end of the *second* term after such imprisonment; the judges, in favour of liberty, determined, that where a defendant was arrested in one term, on a writ returnable the next, the term in which the defendant was arrested should be reckoned as one of the two terms; and consequently, that the defendant should be discharged, for want of a declaration, after the end of the same term in which the writ was returnableⁿ. This practice however has been since altered; and it is now settled, agreeably to the letter and intention of the statute, that “in all cases where a prisoner
 “is taken or charged in custody, by mesne process
 “issuing out of this court, the plaintiff may declare
 “against him, before the end of the next term after
 “the return of the process, by virtue whereof he
 was

¹ Reg. 3. § 6. and see
 Carth. 469. 1 Salk. 98. S. C.

^m R. T. 2 Geo. I.

ⁿ 3 Bur. 1448. 4 Bur. 2060.

“ was taken or charged in custody °.” And a plaintiff need not declare against a prisoner, until the end of the term next after the return of the writ, even though there was time in the term in which the writ was sued out, to have made it returnable in that term, and it be not in fact made returnable until the next term ^p. The term however, in which the process whereon the defendant was arrested is returnable, is still accounted one of the two terms; although it be returnable on the last day of the term ^q. And the plaintiff cannot declare *before* the return of the process, upon which the defendant was taken or charged in custody ^r.

If the defendant be taken and detained, or charged in custody of the sheriff, &c. for a *bailable* cause of action, a copy of the declaration should be delivered personally to the defendant, or left for him with the gaoler, or keeper of the gaol or prison, in whose custody he is confined ^s; it not being sufficient in such case to leave a declaration in the office, to which the defendant is not obliged to plead, and on which the plaintiff cannot take a regular judgment ^t. And “ if
“ any gaoler or keeper of a prison, having received a
“ copy

° R. H. 26 Geo. III.

^s Stat. 4 & 5 W. & M. c.

^p 6 T. R. 547.

21.

^q R. T. 2 Geo. I. (a).

^t 1 Str. 474. and see 1 Bos.

^r R. E. 5 W. & M. Reg. 3. & Pul. 535.

§ 1.

“ copy of a declaration, against any prisoner in his
 “ custody, shall suppress the same, and not deliver
 “ it forthwith unto such prisoner, an attachment
 “ shall be issued against him.” But if the defend-
 ant be served in custody of the sheriff, &c. with a
 copy of process, at the suit of the *same* or a *different*
 plaintiff, it is not necessary that a copy of the declara-
 tion should be delivered personally to the defendant,
 or left for him with the gaoler or turnkey; but it
 may be delivered or filed, absolutely or *de bene esse*,
 and the plaintiff may proceed thereon, as if the de-
 fendant were at large ^v.

The plaintiff having declared, an *affidavit* should
 be made, and filed with the clerk of the rules, before
 the first day of the ensuing term^w, stating the delive-
 ry of a copy of the declaration, and the time when,
 and person to whom, the same was delivered^x; if to
 a gaoler or turnkey, that he acknowledged the de-
 fendant was then a prisoner in his custody^y; and
 that the defendant was arrested, or charged in custo-
 dy, by process of this court, returnable before the
 delivery of the copy^x. The time when such affida-
 vit was filed should be entered thereon, by the
 clerk of the rules, and a copy of it produced to the
 secondary, before judgment^x. Hence it is ne-
 cessary,

^u R. E. 5 W. & M. Reg. 3. § 2. and see Append. Chap.
 § 7. XV. § 13.

^v 1 T. R. 192.

^y R. E. 5 W. & M. Reg. 3.

^w R. H. 26 Geo. III.

§ 2. (a).

^x R. E. 5 W. & M. Reg. 3.

cessary, and usual in practice, where the defendant is in custody of the sheriff, &c. to have *three* copies of the declaration; one to be delivered to the defendant, or left for him with the gaoler or turnkey; another to be annexed to the original affidavit of such delivery, and filed with the clerk of the rules; and a third, to be annexed to an office-copy of such affidavit: On this last copy, the master will give a rule, which the clerk of the rules enters in his paper, for the defendant to appear and plead; and on default thereof, judgment may be signed².

The times of appearing and pleading, when the defendant is in custody of the sheriff, &c. are regulated as follows: That “upon every arrest by mesne
 “ process out of this court, returnable the first day of
 “ Easter or Michaelmas term, if a copy of the de-
 “ claration be delivered against the defendant, before
 “ one month from the day of Easter, or the mor-
 “ row of All Souls,” (that is, before the *third* re-
 turn of Easter term, or of Michaelmas term, as it
 then stood^a,) “and affidavit thereof made and
 “ filed, and the defendant do not appear before
 “ the end of *ten* days after those terms respective-
 “ ly, judgment may be entered against him, if rules
 “ have

² R. E. 5 W. & M. Reg. 3. since shortened, by the statute
 § 2. 24 Geo. II. c. 48.

^a This term having been

“ have been given: but if he appear within that
 “ time, he shall imparl until the next term; unless
 “ the action be in London or Middlesex, and the
 “ defendant be in prison within forty miles of Lon-
 “ don or Westminster: Then, though he appear be-
 “ fore the expiration of that time, he shall plead *two*
 “ days before the essoin-day of the next term: and
 “ in default thereof, rules having been given, judg-
 “ ment may be entered against him as aforesaid ^b. ”

That “ if a copy of the declaration be delivered
 “ against such defendant, on or after one month
 “ from the day of Easter in Easter term, or the
 “ morrow of All Souls in Michaelmas term, or in
 “ Hilary or Trinity term, and thereupon the plain-
 “ tiff give rules to appear and answer, then if the
 “ defendant appear *two* days before the essoin-day
 “ of the next term, he shall imparl until the next
 “ term; but if he do not appear within that time,
 “ judgment may be given against him ^c. ”

And that “ if a writ be returnable in any term,
 “ and a copy of the declaration have been deli-
 “ vered before the essoin-day of the next term, the
 “ plaintiff in such next term may give rules to
 “ appear and answer: And if the defendant do not
 “ appear

^b R. E. 5 W. & M. Reg. 3. ^c *Id.* § 4.

§ 3.

“ appear and plead upon the expiration of the rules,
 “ judgment shall be given against him ^d. ”

When the defendant is in custody of the sheriff, &c. the demand of a plea is unnecessary ^e. And where a plea is filed by the defendant, at an earlier time than by the rules of the court he is compellable to plead, he must, in order to prevent surprise, give notice of his plea ^f: But no such notice is required, where the plea is filed in regular time ^g. In other respects, the proceedings subsequent to the declaration, against a defendant in custody of the sheriff, &c. are similar to the proceedings against him, when in custody of the marshal.

^d R. E. 5 W. & M. Reg. 3. but see 2 Bos. & Pul. 367.

§ 5.

^f 4 T. R. 664. 8 T. R. 596.

^e 1 T. R. 591. 6 T. R. 524.

^g 5 T. R. 473.

CHAPTER XVI.

Of the PROCEEDINGS in ACTIONS against PRISONERS, in the actual CUSTODY of the MARSHAL or SHERIFF, &c. subsequent to the Plea.

AFTER the delivery of the declaration against a prisoner in custody of the marshal or sheriff, &c. except on a *surrender* in discharge of bail, the plaintiff should proceed to trial, or final judgment, within *three* terms next after such declaration delivered, if by the course of the court he can so proceed; of which three terms, the term of the declaration is one ^a; and should cause the defendant to be charged in execution, within *two* terms next after such trial or judgment; of which two terms, the term wherein the trial was had, or judgment obtained, is also one ^a; in case no writ of error be depending, nor injunction obtained for stay of proceedings: And if any writ of error be depending, or injunction obtained, then within *two* terms next after the judgment be affirmed, the writ of error *non pros'd* or discontinued, or the injunction dissolved; including the term of the affirmance, *non pros*, discontinuance, or dissolving the injunction ^a.

In

^a R. H. 26 Geo. III. and see R. T. 2 Geo. I. and the notes thereon.

In case of a *surrender* to the marshal in discharge of bail, after declaration, the plaintiff should proceed to trial, or final judgment, within *three* terms next after such surrender, and due notice thereof, if by the course of the court he can so proceed; of which three terms, the term of the surrender is one ^b; or in case of a surrender in discharge of bail, after final judgment, he should cause the defendant to be charged in execution, within *two* terms next after such surrender, and due notice thereof; of which two terms, the term of the surrender is also one ^b; in case no writ of error be depending, nor injunction obtained for stay of proceedings: And if any writ of error be depending, or injunction obtained, then within *two* terms next after the judgment be affirmed, &c ^b. But when a defendant surrenders in discharge of bail, in the vacation after trial and verdict against him, the preceding term is not reckoned as one of the two; but the plaintiff is allowed the two following terms to charge him in execution ^c.

The mode of proceeding to trial and final judgment against a prisoner, is the same as in common cases, except that notice of trial to the gaoler or turnkey is deemed sufficient ^d. And in order to
charge

^b R. T. 2 Geo. I. (*b*). R. H. 26 Geo. III.

¹ Wils. 297. ² Wils. 325. ^c 6 T. R. 776.

³ Bur. 1787. ⁴ Bur. 2069. ^d 1 Str. 248

charge a defendant in execution, the proceedings must be entered on record, and the judgment-roll docketed and filed ^e: after which, if the defendant be a prisoner in the King's Bench prison, the plaintiff's attorney should obtain a rule from the clerk of the rules, for the marshal to acknowledge him in his custody ^f; and the marshal, being served with a copy of the rule, will write his acknowledgment at the bottom of it, which ought to be of the *same* term in which the defendant is charged in execution, and not of a *preceding* term ^g. A *committitur*-piece should be then drawn up, on unstamped parchment, in the form of a bail-piece ^h, and filed with the clerk of the judgments, in order that he may enter the *committitur* on record ⁱ: And it is usual, before this is done, to enter the *committitur* in the marshal's book, kept at the King's Bench office ^k.

It was formerly holden that the *committitur* must be actually entered on record, before the end of the second term inclusive after the judgment, otherwise the defendant was supersedeable; and there was no extension of the time to the continuance-day after term; nor was an entry in the marshal's book in time sufficient ^l. But it was afterwards determined, that

^e But see 2 Bos. & Pul. 168.

ⁱ *Id.* § 3.

^f R. T. 2 Geo. I. § 2. (*b*).

^k 2 Bur. 1049.

Append. Chap. XVI. § 1.

^l 2 Str. 1215. 1226. 3 Bur

§ 1 T. R. 464.

1841.

^h Append. Chap. XVI. § 2.

that if the plaintiff's attorney signed judgment, and filed the *committitur*-piece with the clerk of the judgments, within the second term after trial and verdict against a prisoner, that was a sufficient charging him in execution within two terms, pursuant to the rule of court; though the final judgment and *committitur* were not entered of record, by the officer of the court, till the continuance-day after the second term, provided the entries were then complete ^a. And a rule of court is now made", that "the *committitur* on every judgment obtained against a prisoner in this court, shall be filed with the clerk of the dockets, on or before the last day of the term in which the prisoner is charged in execution: And the said clerk shall enter such *committitur* on the judgment-roll, within four days next after the end of such term, exclusive of the last day of term; unless the last of the four days be *Sunday*, and in that case within five days next after the end of such term; and in default thereof, the prisoner shall be entitled to be discharged." It is usual for the clerk of the judgments, at the end of every term, to send to the marshal a docket or list of the *committiturs* which have been entered in that term, stating therein the names of all the plaintiffs, at whose suit the defendant is charged in execution; from which docket or list, an entry is made

^m 1 East, 405.

East, 410.

ⁿ R. E. 41 Geo. III. 1

made by the marshal. And where the clerk of the judgments had made a mistake, in omitting the name of one of several plaintiffs, in his docket transmitted to the marshal, it was rectified by the court, at the instance of the clerk ^o.

Where the defendant has been once committed, a second commitment for the same cause, before the first is discharged, or notice given that it is abandoned, is clearly informal ^p. But where the defendant being acknowledged by the marshal to be in his custody, at the suit of A, it was moved that he might be charged in execution also, on a judgment of *out-lawry* in another action, at the suit of B, the court ordered the same in the first instance ^q.*

To charge the defendant in execution in a county-gaol, a writ of *capias ad satisfaciendum* must be sued out, and lodged with the sheriff ^r. If the defendant be removed, after declaration, to the *Fleet*, or found in the prison of an *inferior* court, the mode of charging him in execution is by writ of *habeas corpus ad satisfaciendum*, returnable in court, on a day certain in term; and the number of the judgment-roll must be indorsed on the *habeas corpus* ^s. Nor is the prisoner bound to give notice of his

^o *Gage and another v. Parsons*, M. 36 Geo. III.

^p 1 T. R. 227.

^q *Amos v. Martin*, T. 36 Geo. III.

^r Imp. K. B. 514. but see Barnes, 389.

^s Sid. 100. R. M. 1654.

§ 7. R. T. 2 Geo. I. (b).

* *From the Addenda to the London edition.* "The prison-books of the *Fleet* and *King's bench* prisons, though admissible evidence to prove the period of the commitment and discharge of a prisoner, are not admissible to prove the cause of his commitment." 3 Bos. & Pul. 188.

his removal; but the plaintiff must take notice of it at his peril: Therefore where a prisoner, who had been surrendered in discharge of his bail, and afterwards removed to the *Fleet*, without giving any notice to the plaintiff, was charged in execution, as a prisoner in the King's Bench, the court granted a *supersedeas*; for the plaintiff should have demanded to see the prisoner, and if not produced, would have known where to find him, and bring him back by *habeas corpus*, to charge him; and it would be putting difficulties upon prisoners, to oblige them to give notice ^t. When the defendant is charged, by any of these means, the execution is considered as executed; and therefore, where the plaintiff afterwards died, it was holden that his executors were not bound to revive the judgment by *scire facias*; or to charge the defendant in execution *de novo* ^u. But where the plaintiff, having charged the defendant in execution, died, and the defendant's wife took out administration to the plaintiff, the court ordered the defendant to be discharged out of custody; and held that the plaintiff's attorney had no lien on the judgment for his costs ^v.

If the declaration be not delivered, and an affidavit thereof duly made and filed, (where the defendant

^t 2 Str. 1153.

Barnes, 258. 336. 1 Bos. and

^u *King v. Millett*, H. 22 Pul. 176.

Geo. III. *Combrune v. —* ^v 8 T. R. 407.

T. 42 G. III. *accord*, but see

defendant is in custody of the sheriff, &c.) or if the plaintiff do not proceed to trial or final judgment, or cause the defendant to be charged in execution, in due time, the defendant may be discharged out of custody, by writ of *supersedeas* or otherwise, according to the course of the court, on filing common bail by *bill*, or entering a common appearance by *original*; unless, upon notice given to the plaintiff's attorney, good cause be shewn to the contrary^w. And the defendant may also be discharged out of custody, when the action is abated, discontinued, or decided in his favour.

To *discharge* a prisoner for not declaring, or for not proceeding to final judgment or execution, in due time, the defendant's attorney or agent should obtain a *certificate*^s, or copy of the causes where-with he stands charged, from the clerk of the papers of the King's Bench prison, if in custody of the marshal; or if in custody of a sheriff or other officer, from the goaler or keeper of the prison in which he is confined^z; and in the latter case, an *affidavit*

^w R. H. 26 Geo. III. and § 1. (b). 1 Str. 474. But see R. E. 5 W. & M. Reg. 5. this certificate was found to be useless; as the filing of a bill or declaration might be

^s It was formerly necessary to get a certificate from the clerk of the declarations, that no bill or declaration was filed in his office against the defendant. R. T. 2 Geo. I. § 1. (b). 1 Str. 474. But this certificate was found to be useless; as the filing of a bill or declaration might be shewn for cause against the defendant's discharge, and therefore it is now dispensed with.

^z R. T. 2 Geo. I. § 1. (b). Append. Chap. XVI. § 4.

affidavit must be made, of his having signed the same^z: upon which a summons should be taken out, and served on the plaintiff's attorney or agent, to attend a judge, and shew cause why the defendant should not be discharged out of the custody of the *marshal*^a; or if in custody of a sheriff, &c. why a writ of *supersedeas* should not issue to discharge him, on filing common bail by *bill*, or entering a common appearance by *original*.

At the time appointed by the summons, the plaintiff's attorney or agent either attends and consents to an order, shews cause against it, or does not attend. In the latter case, an *affidavit* being made of the service and attendance^b, the judge will make an order for the defendant's discharge, on the *first* summons, if the application be for not declaring: but if it be for not proceeding to judgment or execution in due time, there must be *three* summonses, before the judge will make an order for non-attendance; and in a country cause, the order on an attendance is not absolute in the first instance, but only an order *nisi*, unless cause be shewn in a week, to give the agent an opportunity of writing to his client for instructions.

When an order is made for the defendant's discharge, common bail should be filed with the clerk
of

^z Append. Chap. XVI. § 5.

^b *Id. ibid.* Append. Chap.

^a R. E. 16 Car. II. reg. 1

XVI. § 6.

of the common bails by *bill*^c, or a common appearance entered with the *filacer* by *original*: and if the defendant be in custody of the marshal, a certificate from the clerk of the bails or *filacer*, of the bail being filed, or an appearance entered, will be a sufficient ground for discharging him, without a *supersedeas*^d. But if the defendant be in custody of a sheriff or other officer, he must sue out a writ of *supersedeas*^e; for issuing which by *bill*, the bail-piece, signed by one of the judges, is a warrant to the officer, with whom it is to be left; and he delivers it over to the clerk of the common bails to be filed^f. By *original*, the writ of *supersedeas* is made out by the *filacer*^g.

Having thus shewn in what manner the defendant is to be discharged, it will be proper to consider what causes will be sufficient to prevent his discharge, for not declaring, proceeding to trial or final judgment, or charging him in execution. We have already seen^h, that where a prisoner is supersedeable, for want of filing a bill against him in due time, he waives the irregularity by afterwards pleading. Where there are two defendants, and one of them is arrested and detained in prison, but the other absconds, so that the plaintiff is obliged to

^c R. T. 9 W. III.

^d R. T. 2 Geo. I. § 2. (b).

^e Append. Chap. XVI. § 3,
&c.

^f R. T. 2 Geo. I. § 2. (b).

^g Trye, *in pref.*

^h *Ante* 305, 6.

to proceed to outlawry against him, this seems to be a good cause for not declaring against the defendant who is in prison, until the other defendant be outlawed ⁱ. But it is said, that in such case the plaintiff must move for time to declare against the defendant in custody ^k.

After declaration, if the *venue* be laid in a county where the assizes are holden but once a year, it may be impossible, by the course of the court, for the plaintiff to try his cause in *three* terms: this therefore, when it happens, is allowed to be a good cause for not proceeding to trial ^l. So where the writ, in a country cause, was returnable in Michaelmas term, and the plaintiff declared in Hilary, and the defendant imparled till Easter-term, by which means the plaintiff was disabled from proceeding to trial, till the next summer assizes, a judge refused to grant a *supersedeas* ^m. And in like manner, where the court take time to give judgment on *demurrer*, &c. they will not suffer the plaintiff to be prejudiced, but will allow this to be a good cause for not proceeding to final judgment ⁿ.

After trial or final judgment, a writ of error and injunction are, whilst they continue in force, good causes

ⁱ Barnes, 401. ² Blac. Rep. 759. Pr. Reg. 327. *semb. contra.*

^l Barnes, 385.

^m *Cripps* and *Wiggin*, T. 28 Geo. III.

^k *Per Cur.* E. 12. Geo. III
² Crompt. 9

ⁿ Barnes, 383.

causes for not charging the defendant in execution^o. And a regular treaty of accommodation, or agreement for a compromise, is, in any stage of the action, a good cause for not declaring, &c.^p But no treaty or agreement is sufficient to prevent a *supersedeas*, unless it be in writing, signed by the defendant or his attorney, or some person duly authorised by the defendant; and it be expressed therein, that proceedings are stayed at the defendant's request^q.

If the defendant be superseded, or supersedeable, for want of proceedings *before* judgment, the plaintiff may nevertheless take or charge him in execution, at any time *after* judgment^r. But he cannot do so, if the defendant be superseded, or supersedeable, for want of being charged in execution^s. And in the latter case, the defendant cannot be holden to special bail in a second action, upon the judgment^t. The *supersedeas* however, in the first action, cannot be pleaded in bar of the second^u. And after judgment obtained in the second action, the defendant is again liable to be taken in execution^v.

^o 2 Wils. 380. R. II. 26 Geo. III. K. B. but see 1 Bos. & Pul. 292. C. P.

^p 4 Bur. 2063. 3 Wils. 455. 1 East, 78. *in notis*.

^q R. H. 26 Geo. III.

^r R. T. 2 Geo. I. § 1. (c).

^s 1 T. R. 591. (a). *Davies* and *Brown*, in the exchequer,

M. 27 Geo. III. S. P. But in the common pleas, he cannot be detained in an action on the judgment. 1 Bos. & Pul. 361.

^t R. T. 2 Geo. I. § 1. (c)

^u Cowp. 72.

^v 1 T. R. 273.

^w Cowp. 72.

CHAPTER XVII.

Of the REMOVAL of CAUSES from INFERIOR COURTS.

HAVING already shewn the different modes of *commencing* actions, in the court of King's Bench, it may be proper to take a view of the various means by which they are *removed* thither from inferior courts. These are by writ of *certiorari* or *habeas corpus*, from inferior courts of record; or by writ of *pone, recordari facias loquelam*, or *accedas ad curiam*, from such as are not of record.

The writ of *certiorari* is a writ issuing sometimes out of Chancery, and sometimes out of the King's Bench: and lieth where the king would be certified of any record which is in the treasury, or in the Common Pleas, or in any other court of record; or before the sheriff and coroners; or of a record before commissioners, or before the escheator; in which cases he may send this writ to any of the said courts or officers, to certify such record before him *in banco*, or in Chancery, or before other justices, where the king pleaseth to have the same certified: and he or they to whom the *certiorari* is directed, ought to send the same record, or the tenor of it, as commanded by the writ; and if they fail so to do, then an *alias* shall be awarded, and afterwards a

pluries,

pluries, with a clause of *vel causam nobis significes*, and after that an attachment, if good cause be not returned upon the *pluries* ^a.

A *certiorari* lies in civil actions *before* judgment, in the King's Bench, in all cases where this court has jurisdiction, and can administer the same justice to the parties as the court below: and though the cause cannot be determined here, yet this writ may be granted, if the inferior court have no jurisdiction over it, or do not proceed therein according to the rules of the common law ^b. But if the inferior court have jurisdiction, and this court have not, a *certiorari* cannot be had; as where an action is brought in *London* for calling a woman whore ^c, or upon a custom or bye-law, which is only suable in the inferior court ^d. So it lies not in general, where the debt or damages appear to be under forty shillings ^e: but the court of King's Bench have refused to quash a *certiorari* upon this ground, in an action for an assault brought against excise-officers, who could not have had an impartial trial in the inferior court ^f.

After judgment, a *certiorari* does not in general lie,

^a F. N. B. 245. A. B. Gilb. 777, 8. 2 Blac. Rep. 1060. 1
Exec. 175, 6. and see Palm. Bos. & Pul. 93.
562.

^e Brownl. Brev. Jud. 140.

^b 1 Lil. P. R. 253.

2 Brownl. 82. Moyle, 69. Clift,

^c 2 Rol. Abr. 69. Carth. 75. 371.

^d 1 Salk. 352. 6 Mod. 177. ^f 4 T. R. 499.

S. C. Say. Rep. 156. 2 Bur.

lie, to remove a cause from an inferior court; and therefore if it be returned thereon, that the defendant is condemned by judgment, he shall be remanded, and continue in prison, without being let to bail against the will of the plaintiff, until agreement be made with him of the sum adjudged^g. But if a defendant in execution have an action depending against him in the court below, this being returned, will be a cause of detainer in the court above. And in cases of absolute necessity, as where the inferior court refuses to award execution^h, this court will grant a *certiorari* after judgment, for the sake of doing justice between the parties. So where the inferior courts acts in a summary method, or in a new course different from the common law, a *certiorari* lies after judgment; though a writ of error does notⁱ.

If the judgment of an inferior court be removed into the King's Bench by *certiorari*, and the party sue a *scire facias* to have execution upon such judgment, he ought to shew in his *scire facias*, that it is the judgment of an inferior court, removed hither by *certiorari*, and to point out the particular limits of the inferior jurisdiction, and pray execution within those limits: But if the judgment be removed into the King's Bench by writ of *error*, and affirmed, the party may have execution in any part
of

^g Stat. 2 H. V. st. 1. c. 2.
Year Book, 9 H. VI. 8.

^h 1 Lil. P. R. 252, 3.
ⁱ 1 Salk. 268.

of *England*; for by the affirmance it is become the judgment of the king's bench^k. And now, by the statute 19 Geo. III. c. 70. § 4. reciting that persons served with process issuing out of inferior courts, where the debt is under ten pounds, may in order to avoid execution, remove their person and effects beyond the limits of the jurisdiction of such courts; it is enacted, that "in all cases where final judgment shall be obtained in any action or suit, in any inferior court of record, it shall and may be lawful to and for any of his majesty's courts of record at *Westminster*, upon affidavit made and filed of such judgment being obtained, and of diligent search and inquiry having been made after the person of the defendant or his effects, and of execution having issued against such person or effects, and that they are not to be found within the jurisdiction of the inferior court, to cause the record of the said judgment to be removed into such superior court, and to issue writs of execution thereupon, to the sheriff of any county or place, against the defendant's person or effects, in the same manner as upon judgments obtained in the said courts at *Westminster*:" Which provision is extended, by a subsequent statute^l, to the courts

^k 1 Ld. Raym. 216. 3 Salk. 320. Carth. 390. S. C. but see F. N. B. 242. C. Gilb. Repl. 117.

^l 33 Geo. III. c. 68. § 1. 33. and for the form of a writ of *certiorari* on this statute, see Append. Chap. XVII. § 5.

courts in *Wales*, and the *Counties palatine*; with this difference, that from these courts, a transcript of the record is to be removed, and not the record itself. In a case arising upon the former of these statutes, where a judgment was signed against a defendant in an inferior court of record, and he surrendered in discharge of his bail, but before he was charged in execution, he was removed to the Fleet by *habeas corpus*; the court of Common Pleas determined, that a *certiorari* might be granted to remove the record, in order to charge him in execution in the Fleet, on the ground that although the case of a prisoner in actual custody be not within the express terms, yet it is within the equity of the statute^m.

Anciently, it seems, no other court but the *Chancery* could grant a *certiorari*, on a suggestion, where there was nothing before themⁿ: but it is now settled, that a record may be removed into the King's Bench, as well by *certiorari* out of that court^o, as by *certiorari* and *mittimus* out of *Chancery*^p: For the court of King's Bench having the superintendence of all inferior courts, their proceedings are removable into that court, in order that
the

^m 1 H. Blac. 532, 3.

Brev. 77. Append. Chap.

ⁿ Gilb. Exec. 153. cites 41

XVII. § 1, &c.

Ass. 22. *1 Cro. Eliz.* 821. 1 *Ld.* (A). 245.

^o *Cro. Eliz.* 821. 1 *Ld.* (A). Gilb. Exec. 175, 6.

Raym. 216. 2 *Atk.* 317. *Thes.*

the judges may inspect the record, and see whether they keep within the limits of their jurisdiction^a. And a *certiorari* lies to remove a cause from the court of the isle of *Ely*^r, or from the *Cinque-ports*^s, or other exempt jurisdiction. And even in the case of a customary proceeding by foreign attachment, if the defendant cannot find bail below, he may sue out a *certiorari*; and upon putting in bail in this court, the cause shall go on there^t. But it seems to have been formerly holden, that no *certiorari* lay to a *County-palatine*, in civil cases^u: And it cannot now be had as a matter of course^v; or unless a special ground be laid, as that the case strongly calls for a trial at bar^w.

The writ of *certiorari* should be directed to the judge or judges of the inferior court, from which the cause is intended to be removed; and when it is for the removal of a cause, should command them to certify the *record*, with all things touching the same^x: therefore where a *certiorari* in such case was to certify the *tenor* of a record, it was superseded as erroneous; for being to remove a record out of an inferior court, in order to be proceeded on in a superior

^a Gilb. Exec. 143. 1 Salk. 144, 5.

^r 1 Salk. 148. 2 Ld. Raym. 836. 7 Mod. 138. S. C. and see 3 East, 128.

^s 1 Lil. P. R. 253. 257.

^t 1 Salk. 148. 2 Ld. Raym. 837. 7 Mod. 138. S. C.

^u Gilb. Exec. 201.

^v Doug. 749.

^w *Id. ibid.* Append. Chap. XVII. § 4. As to *Wales*, see Gilb. Exec. 201.

^x Append. Chap. XVII. §

1, &c

superior one, it ought to have been to certify the very record; for otherwise no proceeding could be had upon it^y. Where the *certiorari* issues out of Chancery, it is an *original* writ, and may be tested at any time in term or vacation^z; and should be made returnable on a general return-day: But where it issues out of the King's Bench, it is a *judicial* writ, and should be tested in term-time; and is usually made returnable on a day certain in court^a. If the writ be mis-directed^b, or otherwise bad in point of law, the court will order it to be *quashed*, if before them; or if not returned, will grant a *supersedeas*^c. But the court cannot quash a writ that is not before them^c. And though the parties to whom the *certiorari* is directed, and in whose keeping the record is, may object to make a return of it, on account of an informality in the direction, yet they having in fact returned it into this court, no such objection can be taken by third persons^d.

The writ of *certiorari* lies for the removal of all causes from inferior courts, whether the defendant has been proceeded against therein by *capias*, or other process: But the writ of *habeas corpus*, which will next be considered, only lies where the defendant has been arrested upon, or served with a copy of a *capias*, and either remains in custody, or has
been

^y 2 Atk. 317.

^b 2 Atk. 318, 19.

^z Trye, 10.

^c *Id.* 318. and see Say. Rep.

^a *Thes. Brev.* 67, 8. Ap- 156.

pend. Chap. XVII. § 1, &c.

^d 4 T. R. 499.

been let to bail. This latter writ, though its direct object be to bring up the body of the defendant, serves consequentially to remove causes against him from inferior courts: And the ground of removal upon this writ is, that when a defendant, against whom there is a cause depending in an inferior court, is removed by *habeas corpus* into the court of King's Bench, the inferior court have lost their jurisdiction over him; and not having jurisdiction over his person, they cannot proceed in the cause, and the bail, if any, in the inferior court are discharged ^e.

The writ of *habeas corpus*, of which something has been already said ^f, as it is used to remove prisoners into the custody of the marshal, is a judicial writ, issuing out of the court of King's Bench: and like the *certiorari*, should be directed to the judge or judges of the inferior court, in which the record is ^g; commanding them to have the body of the defendant, together with the day and cause of his being taken and detained, to do and receive, &c. ^h And when it is directed to the inferior courts of *London*, *Westminster*, *Southwark*, and other courts within five miles of *London*, it may be returnable *immediatè*; but otherwise it must be returnable on a day certain in court ⁱ.

The

^e Skin. 244, 5. and see 3 Bac. Abr. 15.

^f *Ante*, 296, &c.

^g For the direction of the writ of *habeas corpus* in par-

ticular cases, see Append. Chap. XVII. § 6.

^h Append. Chap. XV. § 2.

ⁱ R. M. 1654. § 8.

The writ of *certiorari* or *habeas corpus*, when delivered to the judge or judges of the court below, instantly suspends their power; so that if they afterwards proceed, it is a contempt, for which they are liable to an attachment; and the subsequent proceedings are void and *coram non judice*^k. On receipt of the writ therefore, it should be forthwith allowed and returned. And the officer cannot refuse to obey it, under pretence of not being paid his fees in the court below, or the charges of bringing up the defendant^l: for the former, he has a proper remedy by action, and for the latter, if not paid, the defendant may be remanded^m.

It was formerly usual for the defendant in an inferior court to sue out a writ of *certiorari* or *habeas corpus*, and keep it in his pocket, without producing it, till issue was joined, the jury sworn, and the plaintiff had given his evidence; by which means the plaintiff was not only put to a considerable expence, but the defendant, knowing beforehand what proofs he could produce, had an opportunity of opposing them by false witnessesⁿ. To
remedy

^k Bro. Abr. tit. *Cause de removal plea*, pl. 48. 1 Salk. 148, 9. 2 Ld. Raym. 837, 8. S. C. as to the writ of *habeas corpus*.
^l 2 Str. 814. 2 Bur. 1152.
^m 1 Str. 308. 2 Str. 1262.
ⁿ See the preamble to the statute 43 Eliz. c. 5. But if

remedy this mischief it was enacted by the statute 43 Eliz. c. 5. that “no writ of *habeas corpus*, or other writ to remove any cause depending in an inferior court, having jurisdiction thereof, shall be received or allowed by the judges or officers of such court, but they may proceed therein, as if no such writ were sued forth or delivered, except the said writ be delivered to such judges or officers, before the jury have appeared, and one of them is sworn.” And still further to avoid vexatious delays, by the removal of causes out of inferior courts, it was enacted by the statute 21 Jac. I. c. 21. § 2. that “no writ of *habeas corpus*, *certiorari*, or other writ, except writs of error or attain, to stay or remove any cause depending in an inferior court of record, having jurisdiction thereof, where the same arises within its jurisdiction, shall be received or allowed by the judges or officers of such court, but they may proceed therein, &c. except the said writ be delivered to such judges or officers, before *issue* or *demurrer* joined in the said cause; so as the same be not joined within six weeks next after the arrest or appearance of the defendant.” This statute is confined

the *certiorari* had been delivered after the jury were charged with the evidences, the inferior court might have proceeded to take the verdict. and then certified; be-

cause the jury were sworn to speak the truth, and the intent of the *certiorari* in such case was not to stop the trial. *Gilb. Exec.* 144.

confined to inferior courts of record; and does not extend to the case of an interlocutory judgment: Therefore the practice in that case is to allow the *habeas corpus* or *certiorari*, in like manner as upon the 43 Eliz. provided it be delivered at any time before the jury are sworn^o; which is also the practice, where issue is joined within six weeks next after the defendant's arrest or appearance.

By the last-mentioned statute it is further provided, that “ if any cause, not concerning freehold or inheritance, or title of land, lease or rent, commenced
“ or depending in any such inferior court of record,
“ it shall appear or be laid in the declaration, that the
“ debt, damages or things demanded do not amount
“ to, or exceed the sum of *five* pounds, then such
“ cause shall not be stayed or removed by any writ
“ or writs whatsoever, other than writs of error or
“ attain^t. And if any writ or writs shall be granted
“ or sued forth contrary to the intent and meaning
“ of this act, the judges of the inferior court may
“ disallow and refuse the same, and proceed as if no
“ such writ had been granted or sued forth: provided
“ there be an utter-barrister, of three years standing
“ at the bar of one of the four inns of court, steward
“ or under-steward, town-clerk, judge or recorder
“ of such inferior court, or assistant to the judge
“ or judges of the same, who is not an utter-bar-
“ rister

^o 2 Bur. 759. but see Pr. C. *contra*.

Reg. 217. Barnes, 221. S. p 21 Jac. I. c. 23. § 4.

“ rister of that standing, there present, and not of
 “ counsel in any action or suit there depending ^q.”
 If this proviso be not complied with, the cause may
 be removed at any time ^r: and the court will not
 grant a *procedendo*, where the judge is a barrister, if
 he be not present at the trial ^s.

Soon after the making of this statute, a method
 was contrived of removing causes for sums not
 exceeding *five* pounds, by setting up an action for
 a fictitious demand, to a larger amount; and then,
 upon suing out a *habeas corpus*, all the causes were
 removed together ^t. To defeat this contrivance,
 it was enacted by a subsequent statute ^u, that “ the
 “ judges of such inferior courts as are described
 “ in the statute of *James*, may proceed in such
 “ causes as are therein specified, which appear or
 “ are laid not to exceed the sum of *five* pounds,
 “ although there may be other actions against the
 “ defendant, wherein the plaintiff’s demands may
 “ exceed the sum of five pounds.” And lastly,
 by the statute 19 Geo. III. c. 70. § 6. which takes
 away the arrest under ten pounds in inferior courts,
 it is provided, that “ no cause, where the cause of
 “ action shall not amount to the sum of *ten* pounds
 “ or upwards, shall be removed or removeable
 “ into any superior court, by any writ of *habeas*
 “ *corpus* or otherwise, unless the defendant shall
 “ enter

^q 21 Jac. I. c. 23. § 6.

^s 1 Bur. 514.

^r Cro. Car. 79 3 Mod.

^t Palm. 403.

^u 12 Geo. I. c. 29. § 3.

“ enter into a recognisance to the plaintiff, in the inferior court, with two sufficient sureties, in double the sum due, for the payment of the debt and costs, in case judgment shall pass against him.”

On a *certiorari*, the record itself is returned, in the condition in which it was when the writ came to the court below^v: And this writ removes all things done in that court, between the *teste* and return of it^w. But upon a *habeas corpus*, the record itself is never removed, as it is upon a *certiorari*, but remains below; and the return is only an account or history of the proceedings, stated and sent up to the superior court, to enable them to judge and determine the matter there^x. It is not deemed a sufficient return to a *habeas corpus*, that before the coming of the writ, the party was bailed; for he is still in custody in contemplation of law^y. And when the writ is disallowed by the inferior court, for any of the causes before-mentioned^z, it must still be returned to the superior court, with the special matter^a.

On

^v Gilb. Exec. 144. 200. S. C. Skin. 452.

Gilb. Repl. 117. S. P. 1 Salk. ^y Salmon & Slade, H. 25, 352. 6 Mod. 177. S. C. 26 Car. II. cited in 2 Crompt. 2 Ld. Raym. 1102. 2 Atk. 419.

317. ^z Ante, 338, 9.

^w 1 Salk. 149. 2 Ld. Raym. ^a 1 Mod. 195. 3 Mod. 85. 838. S. C. Carth. 59. 2 Crompt. 419, 20.

^x 1 Salk. 352. 6 Mod. 177.

On the return of the *certiorari* or *habeas corpus*, if the defendant be in actual custody on mesne process, the court will not discharge him, until bail be put in and perfected above^b: and therefore in such case, the usual way of gaining the defendant his liberty, is to put in and perfect bail below, before the writ is brought^c. When the defendant is not in actual custody, at the return of the *certiorari* or *habeas corpus*, he must put in bail, if called upon, in the court *above*; which bail is either *common* or *special*, as in the court *below*.

Before the statute 12 Geo. I. c. 29. every defendant, not being an executor or administrator, must have put in *special* bail upon a *certiorari* or *habeas corpus*, in all actions whatsoever, except actions for words and trifling assaults, unless a judge had otherwise ordered^d. By that statute, “no person shall be holden to *special* bail, upon process issuing out of an inferior court, where the cause of action shall not amount to the sum of *forty shillings* or upwards.” And by a subsequent statute^e, “no person shall be arrested, or holden to *special* bail, upon such process, where the cause of action shall not amount to the sum of *ten pounds* or upwards.” Therefore at this day, unless there be a cause of action to that amount, the defendant

^b R. M. 1654. § 7. R. H. 2 Jac. II. (a).

^d R. M. 1654. § 9. R. H. 2 Jac. II. 1 Salk. 98. 102.

^c New Guide, K. B. 244.

^e 19 Geo. III. c. 70.

defendant need not put in *special* bail, upon a *certiorari* or *habeas corpus*, in the court *above*: though if it be under that amount, he must enter into a recognisance with two sureties, to the plaintiff, in the court *below*, pursuant to the statute 19 Geo. III. c. 70. § 6. On a recognisance to render in an inferior court, if the proceedings are removed into the King's Bench by writ of error, a render in that court has been deemed a good performance of the condition ^f.

At the return of the writ of *certiorari* ^g or *habeas corpus*, the plaintiff may have a rule for a *procedendo*, unless the defendant put in bail within *four* days after notice of the rule, if in *term*; if in *vacation*, then a rule or warrant for a *procedendo*, unless good bail be put in, within *six* days after notice thereof ^h. But the defendant cannot put in bail *before* the return of the writ ⁱ: and even afterwards, he is not obliged to do so, unless called upon by rule ^j.

The bail upon a *habeas corpus* are taken on a *bail-piece*, setting forth that the defendant is delivered to bail upon a *habeas corpus*, at the suit of the plaintiff or plaintiffs *in the plaint* ^k; in which respect it differs from the bail-piece upon a *cepi corpus*. The bail-piece

^f 1 Str. 49.

^g 1 Lil. P. R. 252.

^h R. H. 10 W. III. (a).

ⁱ R. M. 1651. R. E. 29 Car.

II. R. H. 10 W. III.

^j New-Guide, K. B. 249.

but see R. M. 1654. § 8.

^k R. T. 8 W. III. Reg. 8.

§ 1. and see Append Chap. XVII. § 7, 8.

piece is usually annexed to the *habeas corpus* and return; it being a rule¹ that “no bail shall be taken
 “upon a *habeas corpus*, by any justice of this court,
 “unless the writ, with the return thereof, shall be
 “offered before the said justice to be filed, at the
 “time of putting it in.” Where *common* bail are sufficient, the bail-piece should be filled up, annexed to the *habeas corpus* and return, and filed by the defendant’s attorney at a judge’s chambers, within the time allowed by the rule^m. Where *special* bail are required, they may be put in at any time pending the rule, before a judge in town, commissioner in the country, or judge of assize in his circuitⁿ: and they are either *absolute* or *de bene esse*, as upon a *cepi corpus*^o.

When special bail are put in upon a *habeas corpus*, notice thereof should be given in writing, before the expiration of the rule, to the plaintiff’s attorney^p; who is allowed *twenty-eight* days after they are put in, to except to them: and if he do not except to them for insufficiency within that time, the bail-piece should be filed by the defendant’s attorney, within *four* days next after the end
 of

¹ R. H. 10 W. III.

^o R. M. 1654. § 7, 8. *Ante*,

^m New-Guide, K. B. 250, 221.
 251.

^p Append. Chap. XVII.

ⁿ R. T. 8 W. III. *Reg. 3.* § 9.

§ 1

of the twenty eight days ^a. If the bail in an inferior court offer to become bail in the action here, the plaintiff is in general compellable to take them; because he might, but did not except to them below: But it is otherwise, where a cause comes hither out of *London*; for the sufficiency of the bail there is at the peril of the clerk, and he is responsible to the plaintiff; so that the plaintiff had not the liberty of excepting to them; and the clerk is not responsible, if they be deficient, in this court, though he was in *London* ^r.

If the plaintiff except against the bail, he may have a rule or warrant for a *procedendo*, unless they are perfected in *four* days after service of the rule ^s: and thereupon the *same* or *different* bail must justify, (as in other cases,) within the four days, if the rule be served in *term*; but if served in *vacation*, it is sufficient for the defendant to give notice, within the time allowed by the rule, of an intended justification on the first day of the ensuing term ^t.

The bail upon a *habeas corpus* are liable to all the actions mentioned in the return of it, wherein the plaintiff or plaintiffs shall declare within two terms ^u. But this must be understood of the bail upon a *habeas*

^a R. M. 1654. § 8. R. M. ^r New-Guide, K. B. 249.
16 Car. II. and note (b). and see Append. Chap. XVII.

^s Salk. 98. § 11, 12.

^t 1 Salk. 97.

^u R. H. 2 Jac. II. (a).

^v R. M. 16 Car. II. (c).

habeas corpus, before declaration: for it is said, that if the plaintiff have declared before the *habeas corpus* delivered, in one action which requires *special* bail, and in another wherein *common* bail is sufficient, the bail shall be *special* only as to that action which requires special bail, and *common* to the other ^v. On a removal *after* declaration, special bail are liable, though the plaintiff declare in a *different* kind of action in the court above, so as it be for the same cause ^w.

If bail be not put in and perfected in due time, a *procedendo* may be awarded ^x: which is a writ directed to the judges of the inferior court, commanding them to proceed in the cause ^y, notwithstanding the writ before delivered to them. The *procedendo* removes the suspension created by the *certiorari* or *habeas corpus* ^z; and this writ may also be awarded, where it appears upon the return of the *habeas corpus*, that the court *above* cannot administer the same justice to the parties as the court *below*; as in the cases before-mentioned ^a, where an action is brought in *London*, for calling a woman *whore*; or upon a custom or bye-law, which is only suable in the inferior court. So where a *habeas corpus* was brought,

^v *Serle v. Newton*, H. 25, § 11, 12.

26 Car. II. 2 Crompt. 428.

^z 1 Salk. 352. 6 Mod. 177

^w 1 Wils. 277.

S. C.

^x R. M. 1654. § 8.

^a *Ante*, 330.

^y Append. Chap. XVII.

brought, after interlocutory and before final judgment in an inferior court, and the defendant died before the return of it, a *procedendo* was awarded: because, by the 8 & 9 W. 3. c. 11. the plaintiff may have a *scire facias* against the executors, and proceed to judgment, which he cannot have in another court; and by this means he would be deprived of the effect of his judgment, which would be unreasonable ^b. So where an action was brought in the sheriff's court of *London* against two partners, and one of them brought a *habeas corpus*, and put in bail for himself only, a *procedendo* was granted: for otherwise the plaintiff would have been disabled from going on in either court ^c.

In causes removed from the Mayor's-court of *London*, the court will allow the validity of the custom or bye-law, upon which the action is founded, to be discussed in a summary way, upon the return of the *certiorari* or *habeas corpus*, and before it is filed ^d: but where an action was brought in that court, and the defendant, who was an attorney of the King's Bench, pleaded his privilege, a *procedendo* was awarded, without prejudice to the defendant's pleading his privilege in the court below ^e. So where a cause was removed from the Mayor's-court of *London* by *habeas corpus*, to which

^b 1 Salk. 352.

^d 1 Ld. Raym. 581.

^c 1 Str. 527.

^e Say. Rep. 156, 7.

which a return was made, stating a custom under which the defendant was sued and arrested, error being suggested on the proceedings below, this court would not stay the *procedendo* merely on that ground; but said they would leave the defendant to his writ of error ^f. But except in causes removed from *London*, this court will not enter into the validity of a custom or bye-law in a summary way, on the return of the *certiorari* or *habeas corpus*; but put the parties to declare upon it here, and demur ^g.

If a record be filed here upon a *certiorari*, it can never be sent back or remanded, either in the term in which it is filed, or any other; and that is plain by the act of 6 H. VIII. c. 6. which enables this court to remand it in case of felony, which otherwise they could not have done ^h: and therefore the *procedendo* must be moved for on the return of the *certiorari*, and before it is filed. But upon a *habeas corpus* it is otherwise; because the very record below is not returned thereon, and therefore cannot be filed; consequently a *procedendo* may be granted on this writ, after the return is filed; because it will not send out any record filed in this court, but only takes off the suspension created by the *habeas corpus* ⁱ. After the cause has been

^f 6 T. R. 760. and see 2 S. C. and see Gilb. Exec. 144, Bos. & Pul. 93. 5.

^g 2 Bur. 775.

ⁱ *Id. ibid.*

^h 1 Salk. 352. 6 Mod. 177.

been once remanded, by writ of *procedendo*, it cannot be again removed, or stayed by any writ before judgment ^k. And if, after a *procedendo* to carry a cause back to an inferior court, the plaintiff recover, and then sue out a *scire facias* against the bail below, and they remove the proceedings against them into the King's Bench by *habeas corpus*, this court will award a *procedendo* in the suit against the bail ^l.

A *certiorari*, as we have already seen, removes the record in a civil cause from the inferior court: but though the record be brought up on this writ, into the court above, yet they do not take up the cause where the record leaves off, but begin the whole proceedings *de novo*; for there is no continuance from the inferior to the superior court, and therefore they cannot proceed on that record which was below: and though a *certiorari* removes the record in the condition in which it was at the time of the service of the writ, and thereby transfers the same into the superior court, yet it cannot make the roll of the inferior court a record of the superior one, but only brings up the record from the inferior to the superior court ^m: and nothing is recorded here but the original ⁿ. Therefore where the proceedings

^k Stat. 21 Jac. I. c. 23. N. B. 71. C. Gilb. Repl. 117.
§ 3. but see 2 Atk. 317.

^l 6 T. R. 365.

ⁿ Bro. Abr. tit. *Cause de re*

^m Gilb. Exec. 144. 200. F. mover plea, pl. 47.

proceedings in an inferior court of record were removed by *certiorari* into the common pleas, and the question was whether the plaintiff should declare *de novo*, it appearing by the return that the parties were at issue in the court below, it was held that the plaintiff must declare *de novo* °.

So upon a *habeas corpus*, the parties have no day in court; and as the record is not removed upon this writ from the inferior court, but only an account or history of their proceedings, the plaintiff must begin *de novo*, and declare against the defendant as in custody of the marshal ^p. But it is otherwise where *conusance* is demanded and allowed; for there the superior court gives a day to the parties in the inferior court, and transfers the roll itself into that court. And the reason of the difference is, that the inferior court which has *conusance* being taken out of a superior one, the judges continue the cause into the inferior court, as into a court erected by the king, and taken out of the ordinary jurisdiction; and therefore the proceedings go on as in the court in which they were commenced: but where the cause is taken from the inferior to the superior court, they do not proceed as in the same court; for
it

° Barnes, 345.

Raym. 1102, 3. 2 Atk. 317.

^p 1 Salk. 352. 6 Mod. 177. Gilb. Repl. 114. 1 T. R. S. C. and see R. M. 16 Car. 372.

11. (c). Skin. 245. 2 Ld.

it would be below the higher jurisdiction not to proceed on it as *res integra*, or to suffer any continuance to be made from a subordinate power to theirs^q.

The declaration upon a *habeas corpus* must be delivered, if at all, before the end of the second term after putting in bail, including the term in which it was put in^r: And if the plaintiff do not declare within that time, the defendant's attorney is not bound to accept a declaration; though the plaintiff cannot be non-prossed for want of it^s. On the removal of a cause by *habeas corpus* out of the courts of *Canterbury*, *Southampton*, *Hull*, *Litchfield*, or *Pool*, which are counties where the judges of *nisi prius* seldom come, if the action be transitory, the venue must be laid in the county of *Kent*, *Southampton*, *York*, *Stafford*, or *Dorset*, where the town and county lies^t. And on a *habeas corpus* returnable in *Michaelmas* or *Easter* term, if the declaration be delivered before the third return, the defendant is not entitled to an imparlance^u. So when a defendant removes the cause by *habeas corpus* from an inferior court,

and

^q Gilb. Exec. 144. 200. terms to declare, after bail
F. N. B. 71. C. Gilb. Repl. put in; and see 6 T. R. 752.
117.

^s R. M. 16 Car. II. (e).

^r 1 Str. 631. Barnes, 90. Cowp. 117. 1 T. R. 372.

but see Cro. Jac. 620. by ^t R. M. 1654, § 9.

which it appears that an- ^u 1 Mod. 1. 2 Salk. 515.
ciently the plaintiff had three 1 Wils. 154.

and the plaintiff does not declare until the next term, an imparlance is not allowed; for such removals being in general considered as dilatory, it would only be adding to the delay, if an imparlance were granted ^u.

If a plaint be levied in an inferior court, within six years after the cause of action arose, and then it be removed into the King's Bench by *habeas corpus*, and the plaintiff declare here *de novo*, and the defendant plead the statute of limitations, the plaintiff, we have seen ^v, may reply, and shew the plant in the inferior court, and that will be sufficient to avoid the statute. And it is a rule, that upon a cause removed by *habeas corpus* out of an inferior court, having jurisdiction of the cause, if judgment be given for the plaintiff, the costs below are to be considered and cast into the judgment; if for the defendant, the charges of putting in bail ^w.



When the inferior court from which the cause is to be removed is not of record, the means of removing it, we may remember, are by *pone, recordari facias loquelam*, or *accedas ad curiam*. These writs are chiefly calculated for the removal of actions

^u 6 T. R. 752. but see 2 Bos. & Pul. 137.

^v *Ante*, 25, 6.

^w R. M. 1654. § 22.

actions of *replevin* from the county court, or court of some lord authorised to grant replevins; for it is beneath the dignity of a superior court to proceed in other actions, if the debt or damages appear to be under *forty* shillings; and therefore in such case, if the cause were removed, the court would remand it by *procedendo*.

If a replevin be sued *by writ* out of Chancery, then if the plaintiff or defendant would remove the cause out of the county court, into the King's Bench ^x or Common Pleas, he ought to sue out a writ of *pone* ^y; which is an *original* writ, issuing out of Chancery, directed to the sheriff of the county where the replevin is brought; and when returnable in the King's Bench ^x, it commands the sheriff to *put* before the king, on a general return-day, wheresoever &c. the plea which is in his county, by the king's writ, between the parties, of the cattle or goods taken and unjustly detained, &c.

The writ of *pone*, if taken out by the *plaintiff* in replevin, hath a clause in it, commanding the sheriff to *summon* the defendant to appear in the court above, at the return-day, that he be then there, to answer the plaintiff thereupon ^z. If the replevin be removed

^x Bro. Abr. tit. *Cause de re-mover plea*, pl. 50. Trye, 94. Repl. 102. Append. Chap. XVII. § 13.

^y F. N. B. 69: M. Gilb. ^z *Id. ibid.*

removed by the *defendant*, then the *pone* commands the sheriff, that he warn the plaintiff to be there, to prosecute his plaint thereupon against the defendant, if he shall think proper^a: And by this means, both parties have a day in the court above^b.

When the plaint is in the county court, and the replevin sued there *without* writ, then if the plaintiff or defendant would remove it, he ought to sue out a writ of *recordari facias loquelam*; which is an original writ, issuing out of chancery^c, directed to the sheriff in whose court the plaint is entered^d, commanding him that in his full county, he cause to be recorded the plaint which is in the same county, without the king's writ; and that he have that record in the court above, on a general return-day, under his seal, and the seals of four lawful knights of his county, who were present at that recording; and that he prefix the same day to the parties, that they be then there, to proceed in the action^e.

And if a replevin be sued by plaint in the court of any lord, other than in the county court before the sheriff, then the *recordari* has a clause therein, commanding the sheriff, that taking with him four discreet

^a Append. Chap. XVII. § 14.

^d Trye, 93.

^b Gilb. Repl. 72.

^c F. N. B. 70. B. Append

^e F. N. B. 70. B. Gilb.

Chap. XVII. § 15.

erect and lawful knights of his county, he go in his proper person to the court of the lord; and in that full court, cause to be recorded the plaint, &c.^f; and from this clause in the writ, it is called an *accedas ad curiam*^g: On this writ the sheriff must go in person to the lord's court, and take with him four men of his county; but it is not necessary that they should be knights^h.

The *plaintiff* may remove the plea out of the *county court*, either by *pone* or *recordari*, without cause shewn; for it is in his own delay: but the *defendant* cannot remove it without cause shewn; for since it is in delay of the plaintiff, a just cause ought to appear on record for such removalⁱ. The cause of removal usually assigned is, that the sheriff or his clerk is related to one of the parties^k; and the sheriff cannot return that the cause is not true. But if either the plaintiff or defendant remove a suit out of the *lord's court*, they ought to shew cause; because they should not oust the lord of the profits of his jurisdiction, without apparent reason^l. And it seems that such causes were anciently examined before the writ was granted,

^f F. N. B. 70. A. Gilb. Repl. 112.

ⁱ Gilb. Repl. 103. cites F. N. B. 69. M. 70. B.

^g Append. Chap. XVII. § 20. and see 2 Bos. & Pul. 138. (a).

^k Append. Chap. XVII. § 14.

^l F. N. B. 70. A. Gilb. Repl. 105.

^h F. N. B. 10. E.

granted, as in *Chancery* they used to examine the cause of action, before the granting of original writs; but this in both cases is now neglected, and such writs are issued as a matter of course ^m.

The writ of *pone*, *recordari* or *accedas*, like the *certiorari* or *habeas corpus*, when delivered to the sheriff or lord to whom it is directed, instantly suspends his power; so that if he afterwards proceed, he is liable to an attachment, and the proceedings are void and *coram non judice*ⁿ. And it has been adjudged, that the officer of the inferior court cannot refuse paying obedience to the writ, under pretence of not being paid his fees; for he is obliged to obey the writ, and has a proper remedy for such fees as are due to him^o. On the receipt of the writ therefore, it should be forthwith allowed and returned, under the peril of an attachment.

The return of the *pone* or *recordari*, &c. should be made and filed by the party suing it out, with the filazer of the court above, in two terms after it is returnable^p; or upon the filazer's certificate, the cursor will issue a *procedendo*^q. The *recordari* and *accedas ad curiam* should be returned under the sheriff's

^m Gilb. Repl. 105.

ⁿ F. N. B. 4. E.

^o 2 Bur. 1151, 2. Gilb. Repl.

115.

^p For the form of the return to a *recordari*, see Appendix. Chap. XVII. § 16.

^q *Id.* § 19, 21.

sheriff's seal, and the seals of four suitors of the court: And it is a good return for the sheriff to say, that after the receipt of the writ, and before the return thereof, no court was holden; and also, that he required the lord to hold his court, and he would not, so that he could not execute the same; and thereupon the justices shall award a *distringas*, directed unto the sheriff, to distrain the lord to hold his court; and *sicut alias*, &c.^r. When the return is filed, the cause it seems cannot afterwards be remanded^s; unless it was removed from a court of ancient demesne^t.

If the *pone* or *recordari*, &c. bear date before the plaint entered in the county, yet the cause is well removed; because both are the king's courts^u. But if the cause be removed out of the court of any other lord, by a writ which bears date before the entry of the plaint, it is not good^v. The reason of the difference is, because the sheriff, by whom the county is held or farmed, being the king's immediate deputy, the king may remove the replevin out of the sheriff's court into his own, without shewing cause; and therefore it is not material whether the *recordari* be tested before the plaint or not: and although the defendant cannot remove the plaint without cause, yet

^r F. N. B. 18. E.^u F. N. B. 71. D. Gilb^s *Id.* 69. M. (a). Gilb. Repl. Repl. 118.

108.

^v *Id. ibid.*^t Gilb. Repl. 111.

yet this is not in order to prevent the sheriff from being ousted of his jurisdiction, but that the plaintiff may not be delayed without good cause shewn: But where the record is removed out of the lord's court, which has a jurisdiction by grant or prescription, there must be cause shewn for such removal; and such cause will be absurd, if the *accedas ad curiam* bear date before the plaint, for that cannot be a cause to oust the lord of his jurisdiction, which was not in being at the time of the writ issued ^w.

So the plaint is well removed by *certiorari*, where it ought to have been by *pone* or *recordari* ^x: So, if one plaint be removed, where another ought to have been; or where there is a variance between the plaint and the writ ^y. If the plaintiff has already declared in the county court, yet nothing shall be removed but the plaint ^z: And though the plea be discontinued in the county, yet the plaintiff or defendant may remove the plaint into the King's Bench or Common Pleas, by *recordari*, &c. and he shall declare, and the court shall hold plea upon the same plaint ^a.

The parties have a day in court upon the *pone* or *recordari*, &c. ^b: and when the return is filed,
the

^w Gilb. Repl. 118, 19.

Repl. 113.

^x F. N. B. 69. M. (a). Gilb.

^a *Id. ibid.*

Repl. 108.

^b 2 Ld. Raym. 1102, 3.

^y *Id. ibid.*

1 T. R. 371.

^z F. N. B. 71. A. Gilb.

the plaintiff should regularly declare, and the defendant enter his appearance, with the filazer of the county out of which the plaint is removed^c. And though the plaintiff has already declared in the inferior court, yet as nothing is removed but the plaint, he must declare *de novo* in the court above^d. If the plaintiff do not declare, the defendant, having entered his appearance, must give a rule to declare, with the filazer; and if the rule be given on or before the appearance-day of the return of the writ, there is no occasion to demand a declaration in writing^e; but otherwise a written demand is necessary^f. And whether the cause be removed by the plaintiff or defendant, if the former do not declare within the time limited by the rule, he may be *non-prossed*^g, and will be subject to the payment of costs^h.

If the defendant do not enter his appearance, upon the return of the *pone* or *recordari*, &c. the plaintiff must give a rule to appear, with the filazer, which expires in four daysⁱ; and if the cause be removed by *pone* by the defendant, a *distringas*^k shall issue, on his making default; and on *nulla bona* returned, a
capias

^c Trye, 94.

^d F. N. B. 71. A. Gilb. Repl. 106, 7.

113.

^e 1 H. Blac. 281.

^f Lil. P. R. 370. Cas. Pr. C.

B. 55. S. C.

^g F. N. B. 70. A. Gilb.

Repl. 106, 7.

^h 1 T. R. 371.

ⁱ 2 Bos. & Pul. 138.

^k And it seems that a *distringas*

capias and process of outlawry¹: But if the cause be removed by *pone* or *recordari* by the *plaintiff*, and the defendant make default, there shall issue a *pone per vadios*^m, and afterwards a *distringas*ⁿ, &c. and so process of outlawry¹. And if the writ by which a cause is removed, be returnable on the first return of the term, and the plaintiff do not declare within four days before the end of that term, the defendant in the Common Pleas is entitled to an imparlance; though he has not appeared within the term^o. The subsequent proceedings are similar to those in common cases.

tringas is the proper process for compelling the defendant's appearance, where the plaint is removed by *accedas ad curiam* by the *plaintiff*. 2 Bos. & Pul. 137.

Gilb. Repl. 106, 7. 3 H. VI. 54, 5. *Thes. brev.* 37. Lil. P. R. 371.

^m Append. Chap. XVII. § 17.

ⁿ *Id.* § 18.

¹ F. N. B. 70. A. (a).

^o 2 Bos. & Pul. 137

CHAPTER XVIII.

Of the DECLARATION.

ON the return of the writ, when the defendant has appeared, and filed common bail, when necessary, or put in and perfected special bail, the plaintiff in due time should *declare* against him. And where the defendant has been arrested upon, or served with a copy of process against the person, the plaintiff may declare *de bene esse*, even before the defendant has appeared: and the declaration is usually delivered before appearance, in actions against attornies and prisoners.

The declaration is a legal specification of the cause of action; and in actions by *original*, is an exposition of the writ, with the addition of time, place, and other circumstances^a. And it is either *in chief*, or *by the bye*. A declaration *in chief* is at the suit of the *same* plaintiff, for the *principal* cause of action, or that for which the writ was sued out: A declaration *by the bye* is at the suit of a *different* plaintiff, or of the *same* plaintiff, for a *different* cause of action.

In actions by *bill*, the plaintiff may declare in chief, as a matter of course, at any time before the end of the next term after the return of the process:

^a Co. Lit. 303. b.

cess^b: and if he be not ready to declare within that time, he may obtain a side-bar rule, from the clerk of the rules, for further time to declare^c, until the first day of the ensuing term; a copy of which rule should be served on the defendant's attorney, or stuck up in the King's Bench office, if the defendant have not appeared. This rule cannot in general be had, where the defendant is a prisoner^d. But where, on a writ against three, one was arrested and lay in gaol, and the other two absconded, the court refused to discharge the prisoner; saying, that he must appear for all, or lie in gaol till the other two were outlawed^e. But the plaintiff in such case should move the court, or apply to a judge, for time to declare against the prisoner, until the outlawry or appearance of the other defendants^f. If the plaintiff be still unprepared, he may obtain other rules for time to declare, from the beginning to the end of the term, and from the end of one term to the beginning of another, alternately, as often as may be necessary. But after several rules have been obtained, the court on motion will make a *peremptory* one, for the

^b Stat. 13 Car. II. stat. 2. 2 T. R. 112. 3 T. R. 123, 4. c. 2. § 3. And for the ancient time of declaring by *bill*, see § 1.

Gilb. C. P. 40, 41. Stat. 8

Eliz. c. 2. Hans. *Introd.* 2. 3

Buist. 214. Cro. Jac. 620. 2

Keb. 478. 812. 12 Mod. 217.

R. M. 10 Geo. II. *Reg.* 2. (b).

^c Append. Chap. XVIII.

^d Pr. Reg. 327.

^e *Per Cur.* E. 12 Geo. III.

2 Cromp. 9. Barnes, 396, 401.

2 Blac. Rep. 759.

^f *Id. ibid.*

the plaintiff to declare, before the end of the term in which the motion is made.

In actions by *original*, when the proceedings were *ore tenus* at the bar of the court, the plaintiff was anciently demandable on the defendant's appearance; and if he did not appear, or would not count against him, he might have been immediately nonsuited^c. But the parties by consent, might have obtained a day before declaration, which was called a *dies datus prece partium*^b; for the consent of the defendant exempted the plaintiff from the necessity of declaring immediately. In that case, if the defendant had made default at the day given, since there was no declaration, the plaintiff could not have had judgment, but was obliged to bring him in again by processⁱ: for none could have judgment, but upon complaint exhibited against the defendant whilst in court. But after declaration, if the defendant had made default, judgment was given against him; because having deserted the court, he ceased to oppose the plaintiff's demand, and so submitted that the court should give judgment^k.

In process of time, when the proceedings were no longer *ore tenus*, but the defendant was at liberty to appear by attorney, the defendant could not have nonsuited the plaintiff, without giving
a rule

^c 2 Hen. IV. 15. 23. 22 79. 3 Leon. 14. Benl. & Dalis.
Edw. IV. 1. 153. S. C. 6 Mod. 6, 7, 8. 1

^b Hardr. 365. Gilb. C. P. Salk. 216. S. C.
41, 2. and see *Doc. pl.* 222. ^k Gilb. C. P. 40, 41.

ⁱ 19 Hen. VIII. 6. Moor,

a rule to declare, and calling for a declaration. If the writ were returnable in *five weeks of Easter*, or on the *last* return of any term, the defendant, having given a rule, and called for a declaration, might have entered a nonsuit, if it were not delivered four days or more before the *essoins*-day of the ensuing term¹: and if the writ were returnable on any other return, the defendant, having in like manner given a rule, and called for a declaration, might have entered a nonsuit, if it were not delivered some time during the same term^m. But if the defendant had appeared the first term, and given no rule to declare, the defendant's attorney might have been compelled to accept a declaration the second term, with an *imparlance*; and the declaration might have been entered as of that term, with an *imparlance* over to the next, or in the first term with an *incipitur*, as the case requiredⁿ. In such case however, if the plaintiff had not declared the second term, a nonsuit might have been entered at the end of the second term, upon a continuance over by *dies datus*, but not the third term or after^o.

This was plainly agreeable to the *ancient* practice of the court of Common Pleas^p. And now the plaintiff, according to the *modern* practice of that court, has a general liberty to declare by original, till

¹ R. M. 1654. § 15. K. B.

^o *Id. ibid.*

^m *Id. ibid.* C. B.

^p R. M. 1654. § 14, 15.

ⁿ R. M. 1654. § 15. K. B.

C. B.

till the end of the next term after the return of the process, whether it be returnable on the first, or any other return of the term ^q. But still the defendant must, before the end of the second term, or within four days after, enter a rule for the plaintiff to declare, and demand a declaration in writing ^r; and if the plaintiff do not declare before the rule is out, the defendant may, at any time before the essoin-day of the next term, sign a *non pros*, but not afterwards ^s: and the plaintiff is not allowed any longer time to declare, without leave, than the time limited by the defendant's rule ^t. But if the plaintiff be not called upon by rule to declare, he hath all the vacation of the second term to declare in ^u.

When the defendant has appeared, and filed bail upon a bill of Middlesex or *latitat*, &c. or the plaintiff has filed it for him according to the statute, the plaintiff may declare *by the bye*, in as many different actions as he thinks fit, at any time before the end of the next term after the return of the process ^w: And after a plea in abatement, if the plaintiff enter on the roll *quod billa cassetur, et defendens eat sine die*, he may at any time during the same term in which the process is returnable, deliver a declaration *by the bye* against the defendant ^x. It is also

^q R. H. 9 Ann. C. B.

^r R. H. 9 Ann. C. B.

^t R. M. 1 Geo. II. *Reg.* 2.

^u Pr. *Reg.* 121.

C. B.

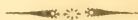
^w R. M. 10 Geo. II. *Reg.* 1.

^s R. H. 9 Ann. C. B. R. (b). But see Gilb. K. B. 310.

M. 10 Geo. II. *Reg.* 2. (b). ^x 5 T. R. 634.

K. B.

also a settled point, that when bail is filed by the *defendant*, upon a bill of Middlesex or *latitat*, &c. any other person besides the plaintiff may declare against him *by the bye*, at any time during the term wherein the process is returnable, *sedente curia*^y: But where bail is filed by the *plaintiff* according to the statute, this is not such a general bringing of the defendant into court, as will warrant any person except the plaintiff, in delivering a declaration *by the bye* against him^z. The plaintiff in the original action must declare in *chief*, before he can declare *by the bye*: but any other person may declare *by the bye*, before the delivery of a declaration *in chief*^b: And indeed, as the plaintiff is allowed *two* terms for declaring, another person who has only *one*, might otherwise be deprived of the opportunity of declaring *by the bye*. In actions by *original*, the privilege of declaring *by the bye* is much more limited; for though the *same* plaintiff is allowed to declare *by the bye*, for a *different* cause of action, at any time during the term in which the process is returnable, yet he cannot so declare after the end of that term; nor can any other person declare by the bye at all.



The *Parts* of a declaration are first, the *title*; secondly, the *venue*; thirdly, the *commencement*; fourthly,

^y Poph. 145. Carth. 377. 1 Saik. 2. S. C. Gilb. K. B. 310. 342. 4 Bur. 2181. 3 T. R. 627.

^z 2 Str. 1027. Cas. temp. Hardw. 207. S. C. R. M. 10 Geo. II. Reg. 1.

^a 6 T. R. 158. 7 T. R. 80. But taking the declaration by the bye out of the office, is a waiver of the irregularity. 3 East, 342.

^b Con. *Phillip's Case*, 1 Crompt. 100.

fourthly, the statement of the *cause of action*; and lastly, the *conclusion*^c. The declaration by *bill*, should regularly be *entitled* of the day on which the writ is returnable; for the bill, of which it is a copy, cannot be filed till the bail is put in, which cannot be till the return of the writ^d: And where there are several defendants, who put in bail of different terms, the declaration should be entitled of the term when the last bail was put in^e. In practice it is usual, when the cause of action will admit of it, to entitle the declaration, whether by bill or original, *generally*,
of

^c In *Heath's Maxims*, it is said that a count or declaration, being terms equivocal, ought principally to contain three things: first, the plaintiff's and defendant's names, which in actions *real* are called *demandant* and *tenant*, and the nature of the action; and this by some is termed the demonstration, or *demonstrative* part of the count: secondly, the time, the place, and the act; in which ought to be comprehended how, and in what manner, the action did accrue, or first arise between the parties; when, what day, what year, and what place, and to whom the action shall be given; which is called the *declarative* part of the count:

and lastly, the perclose or conclusion, which is *unde deterioratus est*, &c.; in which the plaintiff ought to aver, and proffer to prove his *suit*, and shew the *damage* he hath sustained, by the wrong and injury done by the defendant. And the declaration, according to this definition, consisting of a *tria*, somewhat resembling the logical *major*, *minor*, and *conclusion*, some of the ancients (among whom none was more fond of it than Mr. *Fleetwood*, the famous recorder of London) conceived to be a perfect syllogism. *Heath's Max.* 2.

^d *Cas. temp. Hardw.* 141.
But *vide ante*, 290.

^e 1 *Wils.* 242.

of the term in which the writ is returnable; and though filed or delivered, it cannot regularly be entitled, of a subsequent term ^f. But it should always be entitled after the time when the cause of action is stated to have accrued: therefore, where the cause of action is stated to have accrued after the first day of the term in which the writ is returnable, the declaration should be entitled of a subsequent day in that term, and not of the term generally: for a general title refers to the first day of the term; and upon such a title, it would appear that the action was commenced before the cause of it accrued. Yet, where the cause of action was stated to have accrued on the first day of term, the court on demurrer held, that the declaration might be entitled of the term generally; for the delivery of the declaration is the act of the party, and in ancient times it could not have been delivered till the sitting of the court: so that the cause of action might well have accrued before the actual delivery of the declaration ^g. Where a declaration is improperly entitled, the plaintiff may have it corrected, on an affidavit of the fact ^h: And leave has been given to amend the declaration, by entitling it of the day on which it was actually delivered, instead of the term generally, in order to accord with an averment therein, that other defendants

^f 3 T. R. 624.

^g 1 T. R. 116.

^h 1 Wils. 78, and see 7 T. R. 474.

defendants named in the writ were then outlawedⁱ. Or it may be set right, at the instance of the defendant, if necessary for his defence: Thus, where the declaration is entitled of the term generally, and the defendant pleads *plene administravit*^j, or a tender made before the exhibiting of the bill, upon which he would give in evidence an administration of assets, or tender made, between the first day of the term to which the bill relates, and the day of suing out the writ; he has a right to call upon the plaintiff, to entitle his declaration properly^k.

The *venue* in *personal* actions, or county where the action is laid, and intended to be tried, is *local* or *transitory*^l. When the action could only have arisen in a *particular* county, it is *local*, and the venue must be laid in that county; for if it be laid elsewhere, the defendant may demur to the declaration^m, or the plaintiff, on the general issue, will be nonsuited at the trialⁿ. Such are all real and mixed actions, and actions of ejectment, and trespass *quare clausum fregit*, &c. But where the action might have arisen in *any* county, as upon contracts, it is *transitory*, and the plaintiff may in general lay the venue wherever he pleases;

ⁱ 1 East, 133.

73, 4.

^j Cas. temp. Hardw. 141.^l Gilb. C. P. 84.^k 1 Str. 638. 1 Wils. 39.^m 1 Wils. 165.

S. C. cited. 1 Wils. 304. S. P.

ⁿ Cowp. 410. 2. Blac. Rep.and see 4 Esp. Cas. *Ni. Pri.* 1033.

pleases °; subject however to its being changed by the court, if not laid in the very county where the action arose.

To use the words of lord *Mansfield*, in the case of *Fabrigas v. Mostyn* ¹: “ There is a *formal* and a *substantial* distinction, as to the locality of trials. I state them, says he, as different things: With regard to matters arising within the realm, the *substantial* distinction is, where the proceeding is *in rem*, and where the effect of the judgment could not be had, if it were laid in a wrong place. That is the case of all ejectments, where possession is to be delivered by the sheriff of the county; and as trials in *England* are in particular counties, and the officers are county officers, the judgment could not have effect, if the action were not laid in the proper county ².

With regard to matters that arise out of the realm, there is a *substantial* distinction of locality too: for there are some cases that arise out of the realm, which ought not to be tried any where but in the country where they arise; as if two persons fight in *France*, and both happening casually to be here, one should bring an action of *assault* against the other, it might be a doubt whether such an action could be maintained here; because, though it is not a criminal prosecution, it must be laid to be

° Gilb. C. P. 84.

¹ 7 T. R. 587, 8.

² Cowp. 76, 7.

be against the *peace* of the king; but the breach of the peace is merely local, though the trespass against the person is transitory. So if an action were brought, relative to an estate in a foreign country, where the question was a matter of title only, and not of damages, there might be a solid distinction of locality.

But there is likewise a *formal* distinction, which arises from the mode of trial: for trials in *England* being by jury, and the kingdom being divided into counties, and each county considered as a separate district or principality, it is absolutely necessary that there should be some county where the action is brought in particular, that there may be a process to the sheriff of that county to bring a jury from thence to try it. This matter of form goes to all cases that arise abroad; but the law makes a distinction between *transitory* and *local* actions. If the matter, which is the cause of a transitory action, arise within the realm, it may be laid in any county, the place not being material; as if an imprisonment be in *Middlesex*, it may be laid in *Surrey*, and though proved to be done in *Middlesex*, it does not at all prevent the plaintiff from recovering damages. The place of transitory actions is never material, except where by particular acts of parliament, it is made so; as in the case of church wardens and constables, and other cases which require the action to be brought in the county. The parties, upon sufficient ground,
have

have an opportunity of applying to the court in time to change the venue; but if they go to trial without it, that is no objection.

So all actions of a transitory nature that arise abroad, may be laid as happening in an *English* county^r. But there are occasions which make it absolutely necessary to state in the declaration, that the cause of action really happened abroad; as in the case of specialties, where the date must be set forth. If the declaration state a specialty to have been made at *Westminster* in *Middlesex*, and upon producing the deed, it bear date at *Bengal*, the action is gone; because it is such a *variance* between the deed and the declaration, as makes it appear to be a *different* instrument. But the law has in that case invented a fiction; and has said, the party shall first set out the description truly, and then give a venue only for form, and for the sake of trial, by a *videlicet*, in the county of *Middlesex*, or any other county.”

In an action upon a lease for rent, &c. where the action is founded upon the privity of *contract*,
it

^r In a replication to a plea of *ne unques accouple*, &c. in a writ of dower, alleging a marriage in *Scotland*, it is not necessary to state, by way of venue, that the marriage was had in any place in *England*. 2 H. Blac. 145. Nor is it necessary to lay a venue, in a plea in abatement, that another person ought to have been sued jointly with the defendant; and if it be pleaded that such other person is alive, to wit in *Spain*, it will be considered as pleaded without any venue. 7 T. R. 243

it is *transitory*, and the venue may be laid in any county, at the option of the plaintiff; but where the action is founded upon the privity of *estate*, it is *local*, and the venue must be laid in the county where the estate lies. Thus in an action of *debt* or *covenant*, by the lessor against the lessee, the action being founded on the privity of contract, is transitory^s. So if an action of *debt* be brought by the lessor against the *executor* of the lessee, in the *detinet* only, it is transitory^t. But if the action be brought, as it may, against the executor of the lessee as *assignee*, upon the privity of estate, in the *debet* and *detinet*, it is local^u. In *covenant* by the grantee of the reversion against the lessee, the action being founded on the privity of contract, which is transferred from the lessor to the grantee, by the operation of the statute 32 Hen. VIII. c. 34. the action is transitory^v. But in *debt* by the assignee^w, or devisee^x of the lessor, against the lessee, which is founded on the privity of estate, the action is local. So if an action of *debt* or *covenant* be brought by the lessor^y, or his personal representatives,

^s 3 Lev. 154. 6 Mod. 194. ^v 1 Saund. 238. Carth.
2 Str. 776. and see 2 Salk. 183. 1 Wils. 165.
651.

^w Cro. Car. 183. 1 Wils.

^t Gilb. *Debt*, 403. Gilb. 165.
C. P. 91.

^x W. Jon. 53.

^u 2 Lev. 80. 3 Keb. 135. ^y 6 Mod. 194. and see 7 T
S. C. Gilb. *Debt*, 403. Gilb. R. 583.
C. P. 91.

presentatives^z, or by the grantee of the reversion^a, against the assignee of the lessee, it is local, and the venue must be laid in the county where the land lies.

There are however some actions of a *transitory* nature, wherein the venue by act of parliament, must be laid in a particular county. Such are all actions upon penal statutes^b, and actions upon the *case* or *trespass* against justices of peace, mayors or bailiffs of cities or towns corporate, headboroughs, port-reves, constables, tithing-men, church-wardens, &c. or *other* persons acting in their aid and assistance, or by their command, for any thing done in their official capacity^c; and also actions against any person or persons, for any thing done by an officer or officers of the *excise*^d or *customs*^e, or *others* acting in his or their aid, in execution or by reason of his or their office. In these actions, the venue, by various acts of parliament, must be laid in the county where the facts were committed, and not elsewhere.

On

^z Latch, 197.

^a Carth. 182. 3 Mod. 336.
1 Salk. 80. 1 Show. 191. S. C.
7 T. R. 583. 2 East, 580.

^b Stat. 21 Jac. I. c. 4. § 2.
1 Sid. 287.

^c Stat. 21 Jac. I. c. 12. § 5.
But an action against a con-
stable is not confined to the

proper county, where he does
not act in execution of his of-
fice. 1 Str. 446. 3 Bur. 1742.
and see 2 Esp. cas. *Ni. Pri.*

542. 3 Esp. cas. *Ni. Pri.* 226.

^d 23 Geo. III. c. 70. § 34.

^e 24 Geo. III. Sess. 2. c. 47.

§ 35

On the other hand, the venue in a *transitory* action, is in some cases *altogether* optional in the plaintiff; as where the action arises in *Wales*, or beyond the sea, or is brought upon a bond or other specialty, promissory note, or bill of exchange, for *scandalum magnatum*, or a libel dispersed throughout the kingdom, against a carrier or lighterman, or for an escape or false return, and in short, wherever the cause of action is not wholly and necessarily confined to a single county^f. In these cases, the venue cannot be changed by the court, but upon a special ground.

In actions by *original*, the venue in the declaration should be laid in the county where the writ was brought; for otherwise, we have seen, the plaintiff will lose his bail^g. And it is a general rule, that the county in the margin will help, but not hurt^h: Hence, if there be no venue laid in the body of the declaration, reference must be had to the margin; but where a proper venue is laid in the body, the county in the margin will not vitiate itⁱ.

In

^f See the cases referred to in Chap. XXVI.

^g *Ante*, 242, 3. R. H. 22 Geo. III. C. B. *contra*.

^h Lord *Hardwicke* was of opinion, that the word *ff* in the margin of the declaration,

was not originally meant to signify the county, but was only a denotation of each section or paragraph in the record. *Cas. temp. Hardw.* 344.

ⁱ *Id.* 343, 4. *Barnes*, 483. 3 T. R. 387.

In actions by *bill*, against common persons, the declaration begins by stating the defendant to be in custody of the marshal ^k; or if he be in custody of the sheriff, or bailiff or steward of a franchise, having the return and execution of writs, it should allege in whose custody he is, at the time of the declaration, by virtue of the process of the court, at the suit of the plaintiffs ^l. If the action be brought by or against particular persons, as *assignees*, *executors*, &c. the special character in which they sue, or are sued, should be set forth in the beginning of the declaration. And in actions against *attornies*, instead of stating that they are in the custody of the marshal or sheriff, it should be stated that they are present in court ^m; or, in actions against *peers* or *members* of the house of commons, that they have privilege of parliament ⁿ.

In *account*, *covenant*, *debt*, *annuity*, *detinue*, and *replevin*, where the original is a *summons*, the declaration by *original-writ* begins by stating that the defendant was *summoned* to answer: in actions on the *case*, *trespass*, *ejectment*, &c. where the original is an *attachment*, it states that he was *attached* to answer ^o. But where by the declaration it

^k Append. Chap. XV. § 7.
 Chap. XVIII. § 2, &c.

^l *Id.* Chap. XV. § 9, &c.

^m *Id.* Chap. XIII. § 11, &c.

ⁿ *Id.* Chap. VI. § 1, &c.

^o Com. Dig. tit. *Pleader*,
 C. 12. Append. Chap. XVIII.

§ 10, &c.

it appears, that the defendant was *summoned* instead of *attached*, or *vice versâ*, the defendant cannot demur, without craving *oyer* of the original, and setting it forth, in order to shew that it does not warrant the declaration ^p.

It was formerly usual for the declaration by original to repeat the whole of the original-writ ^q. But this practice being productive of great and unnecessary prolixity, a rule of court was made, that “ declarations in actions upon the *case*, and *general* statutes, “ other than *debt*, repeat not the original writ, but “ only the nature of the action; as that the defendant “ was *attached* to answer the plaintiff, *in a plea of “ trespass upon the case*, or *in a plea of trespass and “ contempt, against the form of the statute* ^r.” And even in *trespass vi et armis*, commenced by original, it has been deemed sufficient, on a general demurrer, to state in the declaration, that the defendant was attached to answer the plaintiff *in a plea of trespass*, without setting forth the circumstances ^s.

In

^p Cro. Jac. 108. Cro. 6. And as *oyer* cannot now
Car. 91. 1 Saund. 318. 1 be had of the original-writ,
Sid. 423. 2 Keb. 544. 1 it seems that the declaration
Mod. 3. S. C. 4 Mod. 246. is no longer demurrable, for
2 Salk. 701. 6 Mod. 28. S. C. the above cause.

2 Ld. Raym. 903. Fort. 341. ^q Com. Dig. tit. *Pleader*.
Cas. temp. Hardw. 189. Bar- C. 12.

nard v. Moss, C. B. Com. Dig. ^r R. M. 1654. § 12

tit. *Pleader*, C. 12. 14. 3 M. ^s Carth 108

In actions upon *contracts*, the declaration must in all cases state the *contract* upon which the action is founded and the *breach* of it: And this alone, without more, is in some cases sufficient; as in an action of *debt* on bond, by the obligee against the obligor. *Contracts* are either in *writing*^t, or by *parol*; if in writing, they are either by *deed* under seal, or by *agreement* without seal: And they are either *express* or *implied*; the former are created by the words, the latter by the obvious meaning and intention of the parties. Thus a covenant is implied, from the *habendum* in a lease, for quiet enjoyment; and from the *reddendum*, for payment of the rent^u: So on the indorsement of a note or bill, it is implied, that if the drawer or acceptor do not pay it, the indorser will, on having due notice of its non-payment^v: And in general it may be remarked, that promises are implied, to pay money on legal liabilities^w. With regard to their operation, contracts are *present* or *future*; under the former, may be ranked *warranties*, that a horse is sound, &c.: the latter are to do or omit some act, or to procure it to be done or omitted by another. Contracts must be

^t For the cases in which it is necessary that the contract should be in *writing*, see the statute of frauds and perjuries, 29 Car. II. c. 3.

^u 3 Bac. Abr. 296.

^v Bayley on Bills, 29. 41
42. 57.

^w *Ante*, 3.

be stated in the declaration as they were really made, either in terms, or according to their legal effect; and if there be a variance, it will be fatal^x.

Where the contract is by deed, it is not necessary to set forth the *consideration* upon which it is founded; as the law in that case *implies* a consideration, where none is stated^y: And a consideration is also implied, upon bills of exchange, and promissory notes: But in all other cases, the consideration not being implied, must be stated in the declaration. *Considerations* are commonly said to be *executed* or *executory*; or in other words, the contract is founded upon something already done, or to be done: But there is a third species of considerations, partaking of the nature of both the others, as upon *mutual promises*^z, where the plaintiff's promise is executed, but the thing which he has engaged to perform is executory. In the case of a consideration executed, the defendant cannot traverse the consideration by itself, because it is incorporated and coupled with the promise, and if it were not then in fact executed, it is *nudum pactum*: But if it be executory, the plaintiff

tiff

^x Doug. 665. 1 T. R. 235. 3 Bur. 1639.

but see 3 T. R. 643. 4 T. R. ^z 1 Salk. 171. 1 Ld
558. Raym. 665. S. C.

" 7 T. R. 457. and see

tiff cannot bring his action till the consideration be performed; and if in truth the promise were made, and the consideration not performed, the defendant must traverse the performance, and not the promise, because they are distinct ^a.

It is also commonly said, that to make a good consideration, there must be either an immediate benefit to the party promising, or a loss to the person to whom the promise was made. But this rule is too narrow: For wherever a man is under a *moral* obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration; as if a man promise to pay a just debt, the recovery of which is barred by the statute of limitations; or if a man, after he comes of age, promise to pay a meritorious debt contracted during his minority, but not for necessities; or if a bankrupt in affluent circumstances, after his certificate, promise to pay the whole of his debts; or if a man promise to perform a secret trust, or a trust void for want of writing by the statute of frauds. In these and many other instances, though the promise gives a compulsory remedy, where there was none before, either in law or equity; yet as the promise is only to do what an honest man ought to

^a Bul. N. P. 146.

to do, the ties of conscience upon an upright mind are a sufficient consideration ^b.

Where the promise and consideration explain themselves, without reference to any collateral matter, they are stated in the declaration without any *inducement*: But where that is not the case, the declaration begins by stating the circumstances under which the contract was made, or to which the consideration refers; as in an action of *assumpsit* to pay money, in consideration of forbearance, or of staying proceedings, the declaration begins by stating the debt forborne, or the proceedings that were stayed. The inducement is in nature of a preamble, and leads on to the principal matter of the declaration; and as its office is explanatory, it does not require exact certainty ^c.

Where the consideration is *executed*, and the promise to pay a sum certain, or to do or omit some specific act, the declaration proceeds at once from the contract to the breach, without any intermediate *averments*; as in the case of an *indebitatus assumpsit*, to pay a precedent debt, &c. But where the consideration is *executory*, or the performance of the defendant's covenant or agreement is made to depend on the performance of a condition

^b *Per Lord Mansfield, Cowp.*
290.

^c *Com. Dig. tit. Pleader,*
C. 31.

condition precedent, on the part of the plaintiff, the declaration ought to *aver* that the consideration has been executed, or the condition performed: for it is a rule, that in all cases where the estate or interest commences on a condition precedent, be the condition or act in the affirmative or negative, and to be performed by the plaintiff, the defendant, or any other, the plaintiff ought in his count to aver performance^d; as if a man grant an annuity to another, *when* he is promoted to such a benefice, &c. the plaintiff in *annuity* ought to aver, that he is promoted^e, &c. But where an estate or interest passes or vests immediately, and is to be defeated by a condition *subsequent*, or matter *ex post facto*, be it in the affirmative or negative, or to be performed by the plaintiff or defendant, or by any other, performance of that matter need not be averred^f: as if a grant be of an annuity to A. *till* he be advanced to a benefice, A. in *annuity* need not say that he is not yet advanced^g.

Covenants or agreements are of three kinds; first, such as are called mutual and independent, where either party may recover damages from the other, for the injury he may have received, by a breach of the covenants in his favour, and
where

^d 7 Co. 10. a.

^e Pl. Com. 25. b.

^f 7 Co. 10. a.

^g *Id.* Pl. Com. 25. b. 30. a.

32. b. and see 1 T. R. 64.

2 H. Blac. 579.

where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff: secondly, there are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another; and therefore, till this prior condition be performed, the other party is not liable to an action on his covenant: thirdly, there is also a sort of covenants, which are mutual conditions to be performed at the same time; and in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered, has fulfilled his engagement, and may maintain an action for the default of the other, though it be not certain that either is obliged to do the first act^h.

The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties; and however transposed they may be in the deed, their precedency must depend on the order of time, in which the intent of the transaction requires their performanceⁱ. The words by which conditions precedent are commonly created, are *for*^k, *in consideration of*,
ita

^h *Per Lord Mansfield*, in the case of *Kingston v. Preston*, cited in Doug. 690, 91. and see the several modern cases on this subject, collected and arranged in Willes, 157 (a).
ⁱ Doug. 690. and see 6 T. R. 570. 668. 7 T. R. 130.
^k 1 Vent. 177. 214. 3 Saund. 350. S. C.

ita quod^l, *proinde*^m, &c. In general, if the agreement be that one party shall do an act, and that for the doing thereof the other shall pay a sum of money, the doing of the act is a condition precedent to the payment, and the party who is to pay shall not be compelled to part with his money, till the thing be performedⁿ. And however improbable the thing may be, it must be complied with, or the right which was to attach on its being performed does not vest: As if the condition be, that A. shall enfeoff B. and A. do all in his power to perform the condition, and B. will not receive livery of seisin, it was never doubted, but that the right which was to depend on the performance of the condition did not arise^o. If a person undertake for the act of a *stranger*, the cases are uniform to shew that such act must be performed^p. And where there are *mutual* promises, yet if one thing be the consideration of the other, there a performance is in general necessary^q.

If

^l 2 Ld. Raym. 766.

^m Doug. 688.

ⁿ 1 Salk. 171. 1 Ld. Raym. 665. S. C. and see 1 Ld. Raym. 440. 686. 2 Salk. 623. Com. Rep. 117. 12 Mod. 529. S. C. 1 Str. 535. 615. 2 Str. 712. 1 Wils. 88. 2 Bur. 899. 2 Blac. Rep. 1312. Doug. 27. 272. 620. 684. 1 T. R. 639. 1 H. Blac. 270. 4 T. R. 761. 7

H. Blac. 123. 389. 574. 5 T.

R. 409. 6 T. R. 570. 665.

710. 7 T. R. 125. 8 T. R.

366. 1 East, 203. 2 Bos. & Pul. 447.

^o 6 T. R. 719.

^p *Id.* 722.

^q 1 Salk. 171. 1 Ld. Raym.

665. S. C. 6 T. R. 570. 7 T.

R. 125.

If a day be appointed for payment of money, and the day is to happen before the thing can be performed, an action may be brought for the money before the thing is done; for it appears that the party relied upon his remedy, and intended not to make the performance a condition precedent^r: But where a certain day of payment is appointed, and that day is to happen subsequent to the performance of the thing to be done by the contract, in such case the performance is a condition precedent, and must be averred in an action for the money^r. So if two men agree, one that the other shall have his horse, and the other that he will pay 10*l.* for him, no action lies for the money, till the horse be delivered^r. Another distinction to be attended to is, that where mutual covenants go to the *whole* of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they go only to a *part*, and a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent^s. And it is said, that where the participle *doing*, *performing*, &c. is prefixed to a covenant by another person, it is a mutual covenant, and not a condition precedent^r.

An

^r 1 Salk. 171, 2. 1 Ld. T. R. 572, 3.

Raym. 665, 6. S. C. and see ^t 2 Blac. Rep. 1313. and
2 H. Blac. 392. see Willes, 146. 496.

^s 1 H. Blac. 273. and see 6

An *averment* may be by any words, which shew that the matter is as stated; as that the plaintiff *avers*, or *in fact saith*, or *although*, or *because*, or *with this that*, &c.^u And where there is a condition *precedent*, it is necessary to state in the declaration, that it has been performed, or a lawful excuse for its non-performance^v. But there are some cases in the books, respecting conditions precedent, where the thing agreed to be done having been in effect performed, though not in the exact manner, nor with all the circumstances mentioned, it was deemed a substantial performance^w; as where the condition was to enfeoff, a conveyance by lease and release has been deemed sufficient^x: So if the condition be for one to deliver the will of the testator, and he deliver letters testamentary^y. And wherever a man, by doing a *previous* act, would acquire a right to any debt or duty, by a tender to do the previous act, if the other party refuse to permit him to do it, he acquires the right as completely, as if it had been actually done; and if the tender be defective, owing to the conduct of the other party, such incomplete tender will be sufficient; because it is a general principle, that he who prevents a thing
from

^u Com. Dig. tit. *Pleader*,
C. 77. Willes, 134. 427.

^v 6 T. R. 722.

^x Co: Lit. 207. a.

^y 4 T. R. 761. 6 T. R.
570.

^z 1 Rol. Abr. 426. pl. 2. 4.

from being done, shall not avail himself of the non-performance, which he has occasioned^z. The performance of a condition precedent is also excused by the *absence* of the plaintiff, in those cases where his *presence* is necessary for the performance of the condition; by his *obstructing* or preventing the performance; or by his *neglecting* to do the first act, if it be incumbent on him to perform it^a: It is also excused in some cases, by his not giving notice to the defendant^b. Where the conditions are *mutual*, and to be performed at the same time, the plaintiff must aver that he was ready and offered to perform his part, but the defendant refused to perform his^c. And where the sum to be paid is not ascertained by the contract, the plaintiff must aver the facts necessary to ascertain it; as upon a *quantum meruit* or *valebant*, that the plaintiff *deserved* to have, or that the goods were *worth*, a certain sum, &c.

Where the contract is to pay a collateral sum upon request, there the *request* being parcel of the contract, and as it were a condition precedent, ought to be specially alleged, with the time and place of making it^d; but where the contract is founded

^z Doug. 686. and see 1 T. e 7 T. R. 130.

R. 638.

^d Com. Dig. tit. *Pleader*,

^a 1 Rol. Abr. 457, 8.

C. 69. and see 2 H. Blac. 131.

^b *Id.* 463. 467, 8. and see 5 T. R. 409.

Co. Lit. 207. a.

founded upon a precedent debt or duty, as in the case of a bond, or for money lent ^e, &c. or is for the payment of a collateral sum on a day certain ^f, or otherwise than upon request ^g, or the debt or duty arises immediately upon the performance of the consideration ^h, there it is not necessary to allege a special request, but *licet sæpius requisitus* is sufficient; which is only a form of pleading, and if it be omitted, does not vitiate the declaration ⁱ.

Where the matter alleged lies more properly in the knowledge of the plaintiff, than of the defendant, there the declaration ought to shew that *notice* was given to the defendant ^k; as where the defendant promises to give the plaintiff so much for a commodity as it is worth, or as any other had given him for the like, or to give so much for every cloth the plaintiff should buy, or to pay the plaintiff what damages he had sustained by a battery, or to pay the plaintiff's costs of suit ^k: And when notice is necessary, it ought to appear that it was given in due time, and to a proper person ^l. But where the matter does not lie more properly in the knowledge of the plaintiff than of the defendant,

no

^e 1 Saund. 32.

38. 72. 1 Bos. & Pul. 59, 60.

^f Owen, 109.

^k Hard. 42. and see 16 Vin.

^g 1 Lutw. 231.

Abr. tit. *Notice*. 5 T. R. 621.

^h 1 Str. 88.

^l Com. Dig. tit. *Pleader*, C.

ⁱ Pl. Com. 128. b. Hardr. 74.

no notice is requisite ^m; as in *debt* upon an obligation conditioned to perform an award, notice of the award need not be alleged, because the defendant may take notice of it, as well as the plaintiff: So if upon a treaty of marriage, a promise be made to the father of the daughter, by the father of the son, to pay the daughter 100*l.* after the death of the son, if she survive him, and the son die, an action may be brought upon this promise; and notice need not be given to the defendant, of the death of the son ^m. So on a promise to pay so much money at the full age of an infant, notice of his attaining that age need not be given, because it is as notorious to the one as to the other ^m. And in an action on a promissory note, by the indorsee against the drawer, notice of the indorsement need not be averred ⁿ.

The *breach*, in a declaration upon contract, is either *negative*, that the defendant has not done something which he contracted to do, or procured it to be done by another, or that he has not done it, or procured it to be done, in a careful and proper manner; or it is *affirmative*, that he has done something which he contracted not to do, or suffered it to be done by another, or that he has *deceived* the plaintiff on a warranty, &c. The breach must be assigned in the words of the contract, or in

^m Hard. 42,

ⁿ 1 Bos. & Pul. 625

in words tantamount, which comprehend the substance and effect of it: And in assigning the breach of a covenant for quiet enjoyment, it is sufficient to allege, that at the time of the demise to the plaintiff, A. B. had lawful right and title to the premises, and having such right and title, entered and evicted the plaintiff, without shewing what title A. B. had, or that he evicted plaintiff by legal process °. Where the *damages* sustained by the plaintiff are naturally connected with the breach of contract, it is not usual to state them specially in the declaration; otherwise they should be stated, in order to prevent a surprise upon the defendant.

In actions for *wrongs*, the declaration should state the *injury* complained of; and in actions on the case, it should set forth, by way of *inducement*, the circumstances under which the injury was committed, and the consequential *damages* resulting therefrom to the plaintiff. The injury complained of is *immediate* or *consequential*. Where it is *immediate*, and included in the act complained of, there it is sufficient to state that act alone in the declaration, as in trespass *vi et armis*. The *charge* in such case ought to be direct and positive, and not merely by way of recital: Therefore a declaration by *bill*, stating that *whereas*, or *wherefore* the defendant

dant did the act complained of, is bad on special demurrer; and was formerly holden to be so, in arrest of judgment^p: but now, it may be amended at any time before or after judgment, by a right bill; the time of filing whereof the court will not inquire into^p: And by *original*, the count-part being helped by the recital of the writ, this fault is not fatal, even on a special demurrer^r.

Where the *damages* in trespass are such as naturally arise from the act complained of, or cannot with decency be stated, they may be given in evidence under the *alia enormia*; but otherwise they must be stated in the declaration^s. And many things may be laid in aggravation of damages, for which alone trespass would not lie; as trespass may be brought for entering the plaintiff's house, and beating his wife, child, or servant: but in such case, the plaintiff cannot recover damages for losing the *service* of his child or servant, because he may have a proper action for that purpose, nor can it be given in evidence; but the *beating* may be given in evidence, to aggravate the damages: for now, though it has been holden otherwise formerly, if the principal matter will bear an action, the plaintiff

^p 2 Salk. 636. 1 Str. 621. S. C. 2 Wils. 205.

^q 2 Str. 1151. 1162.

^s Peake's Cas. *M. Pri.* 46

^r 1 Wils. 99. Barnes. 452. 62.

tiff may give any thing in evidence in aggravation of damages, that will not of itself bear an action, for if it will, it must be shewn; as in trespass *quare clausum fregit*, the plaintiff would not be permitted to give evidence of the defendant's taking away a horse, &c. but in trespass *quare clausum et domum fregit*, he may give in evidence that the defendant came into his house, and defiled his daughter ^t.

Consequential injuries, we have seen, arise from *mal-feasance*, *non-feasance* or *mis-feasance*. In actions for mal-feasance, three things are to be attended to in the declaration; first, the *motive*, if any, which urged the defendant to the commission of the act complained of; secondly, the *end* which he had in view; and thirdly, the *means* which he took of accomplishing it. Thus in an action for defamation, the motive is malice, the end proposed is to injure the plaintiff in his good name, &c. and the means are the words spoken by the defendant for that purpose. In actions for mal-feasance, the motive is either *malice*, which generally speaking leads to the commission of injuries to the person, or the gratification of *self-interest* at the expence of another: And accordingly, the *end* which the defendant has in view, is either to injure the plaintiff, or to benefit himself: And the *means* he takes of accomplishing his intention, are either direct and open,

^t Bul. *Ni. Pri.* 89. and see Salk. 642. 1 Str. 61. 4 Bur.

¹ Sid. 225. 6 Mod. 127. 2 1878.

open, or under colour of legal process, or by *deceit*, which is either where there is a privity between the parties, as upon a sale of goods, &c. or where there is no such privity. In actions for *non-feasance* or *misfeasance*, the injury frequently proceeds from a mere neglect, without any bad motive imputable to the defendant.

The circumstances attending the several injuries before mentioned, and which should be stated by way of *inducement*, are various, according to the nature and grounds of the action. In general, they disclose some *right* or *title* in the plaintiff, or some *duty* to be performed by the defendant. In actions for wrongs affecting the *absolute* rights of persons, the right to personal security being implied, need not be stated in the declaration; as in actions of *assault* and *battery*, &c. But where the wrongs complained of affect the *relative* rights of persons, the relation should be stated, in respect of which the plaintiff is injured; as in actions for *criminal conversation*, &c. And where an action is brought for *defamation*, it is usual to state in the declaration, by way of inducement, that the plaintiff is a person of good name, &c. and has not been guilty of the crime imputed to him ^u.

In actions for wrongs to *real* or *personal* property,
the

^u Com. Dig. tit. *Action upon the Case for Defamation*, G. 1

the plaintiff's right or title must be set forth in the declaration, either *generally* or *specialy*. Where a *special* title is necessary to maintain the action, it must be stated with certainty: If a man allege in himself a title to the inheritance or freehold of lands in possession, he ought regularly to say that he was *seised*^v; or if he allege possession of a term for years, or other chattel-real, that he was *possessed*^v: So if he allege seisin of things manurable, as of lands, tenements, rents, &c. he should say that he was seised *in his demesne as of fee*^w; if of things not manurable, as of an advowson, that he was seised *as of fee and right*, omitting *in his demesne*^w. And it is a rule, that where title is necessary to be shewn, if the plaintiff derive a particular estate from another, he ought to shew that the other had such an interest as would enable him to make the estate^x. The reason why the commencement of particular estates must be shewn in pleading is, because they are created by agreement out of the primitive estate; and the court must judge, whether the primitive estate and agreement be sufficient to produce the particular estate claimed: and this is a fundamental rule, which ought not to be broken upon fancied inconveniencies^y.

It

^v Co. Litt 17. a.

^x Com. Dig. tit. *Pleader*.

^w Lit. § 10. and see Com. C. 36.

Dig. tit. *Pleader*, C. 35. 2
Bos. & Pul. 574.

^y 2 Salk. 562. and see 3
Wils. 72.

It is also a rule, that if the plaintiff claim under one who has only a particular estate, as for life, he must aver the continuance of that estate ².

In setting forth a title to *incorporeal* hereditaments, the plaintiff must shew that it was by grant, custom, or prescription. A *grant* ought regularly to be pleaded, with a *profert in curiâ* of the deed containing it; but where the deed is lost or destroyed, by accident or length of time, it may be pleaded without a *profert* ^a. *Custom* is properly a *local* usage, and not annexed to any particular *person*; such as a custom within a manor, that lands shall descend to the youngest son, or that copyholders shall have a right of common, &c. *Prescription* is altogether a *personal* usage; and is either in a *que estate*, or in a man and his *ancestors*; the former is where the right claimed is annexed to, and passes with the land, in which case the plaintiff states that he, and all those whose estate he hath therein, have immemorially had such right; the latter is where the right is not annexed to the land, but lies in grant, in which case the plaintiff must aver that he, and his ancestors, have immemorially enjoyed it.

But in *personal* actions, it is seldom necessary to state a title specially in the declaration; for damages are the gist of these actions, and the title only

² Com. Dig. tit. *Pleader*,
C. 66.

^a 3 T. R. 151.

only matter of inducement^b: And it is a general rule therein, that *possession is sufficient evidence of title against a wrong-doer*; as in trespass *quare clausum fregit*^c, &c. So in an action on the case for a *nuisance* to the plaintiff's house, &c. it is sufficient for the plaintiff in his declaration, to state generally that he was lawfully *possessed* of the house, or other property affected by the injury complained of^d: and if the declaration be for stopping up *lights*, it goes on to state, that by reason of his possession he had, and of right ought to have, the lights that have been obstructed^e. In like manner, the plaintiff in an action for diverting a *water-course* from his mill, need only state, that he was possessed of the mill, and that the water had been accustomed, and of right ought to flow thereto, without stating that it was an *ancient* mill, or disclosing the grounds upon which the right to the water is claimed^f.

In an action upon the case for the *disturbance* of rights of *common*^g, &c. there is this distinction:

Where

^b 10 Co. 59. b.

^c 2 Bulst. 288.

^d 1 Rol. Rep. 593.

^e Cro. Car. 325. 1 Show. 18.

^f 1 Leon. 247. Palm. 290. Cro. Car. 499. 575. 3 Mod. 48. 3 Lev. 133. S. C.

^g 1 Vent. 319. 4 Mod. 418. And for the manner of declaring for the disturbance of *rights of way*, see 1 Vent. 274. 2 Lev. 148. 3 Keb.

328. 3 Lev. 266. 1 Lutw.

120. 2 Ld. Raym. 751. 1090.

3 Ld. Raym. 85.; of *offices*,

10 Co. 59. b. Cro. Eliz. 335.;

of *franchises*, 4 Mod. 423. 1

Show. 18.; of *tolls*, Owen.

109. Cro. Jac. 43. 122, 3.

3 Lev. 190. 2 Lutw. 1517.;

of *ferris*, Willes, 508.; and

of *seats* in churches, 1 Lev.

71. 1 Sid. 203. S. C.

2 Lev. 193. 3 Lev. 73. 1

Wils. 325. 1 T. R. 428.

Where the action is brought against a *wrong-doer*, it is sufficient for the plaintiff to state in his declaration, that he was *possessed* of a house or lands, &c. and by reason of his possession thereof, was entitled to the right, in the exercise of which he has been disturbed: But where the plaintiff would lay any charge or servitude on the land or property of another, he must set forth his title *specially* in the declaration^h. Thus, in an action on the case against a stranger and wrong-doer, for disturbing the plaintiff in the use of a *seat* in a church, no title or consideration is necessary to be shewn: But where the plaintiff claims against the ordinary himself, who hath *primâ facie* the disposal of all the seats in the church, he ought to shew some cause or consideration, as building, repairingⁱ, &c. And though, in the other case, the plaintiff is allowed to declare upon his possession, yet he must prove his title at the trial: And possession for above sixty years of a pew in a church, is not a sufficient title to maintain an action on the case, for disturbance in the enjoyment of it; but the plaintiff must prove a prescriptive right, or a faculty, and should claim it in his declaration, as appurtenant to a messuage in the parish^k. In declaring for wrongs to *personal* property, the plaintiff must state his right;

as

^h 4 Mod. 421. 1 Str. 5. 768.

Willes, 619. 1 Bur. 440. 4 ⁱ 3 Lev. 73.

T. R. 718. but see 3 T. R. ^k 1 T. R. 428

as in trespass for taking goods, that they were his own goods¹; or in trover, that he was possessed of them, &c.

In actions upon the case for a breach of duty, the declaration should state the nature of the duty to be performed by the defendant, which is founded on the general obligation of law, the defendant's particular situation, or some contract or agreement between the parties. Where the defendant is liable of common right, as to repair a wall for preventing damage to his neighbour, it is not necessary for the plaintiff to shew a title in his declaration, or the special ground of the defendant's liability^m: But where a charge is imposed on another, *against* common right, as owner of the soil or tertenant, it was formerly holden, that a title must be shewn, as in an action for not repairing fencesⁿ, &c. So where a special action on the case was brought against the defendant, for not keeping a bull and boar, the declaration was holden bad upon demurrer, for not setting forth that the defendant was obliged to keep them, either by custom, prescription, or otherwise^o. But in a late case, where an action was brought for not repairing a private road, leading through the defendant's close, it was held to be
sufficient

¹ Cro. Jac. 46. 2 Salk, 640. 311. S. C.

¹ 1 Ld. Raym. 239. 2 Ld. ⁿ 1 Salk. 335, 6.
Raym. 890. 2 Str. 1023. ^o 4 Mod. 241.

^m 1 Salk. 22. 360. 6 Mod

sufficient to allege, that the defendant, as *occupier* of the close, was bound to repair it^p: And *per Buller* Justice, the distinction is, between cases where the plaintiff lays a charge upon the right of the defendant, and where the defendant himself prescribes in right of his own estate: In the former case, the plaintiff is presumed to be ignorant of the defendant's estate, and cannot therefore plead it; but in the latter, the defendant, knowing his own estate, in right of which he claims a privilege, must set it forth^q. In actions against sheriffs or other officers, or against carriers, &c. for *mis-feasance*, the declaration must state the nature of the plaintiff's right, and the ground of the defendant's duty.

In actions upon the case for consequential injuries. the *damages* which the plaintiff has sustained, being the gist of the complaint, must be stated in the declaration; which damages must appear to depend on the injury complained of, and not be too *remote*, or happen from the intervention of another cause: And they are either *general* or *special*. *General* damages are such as naturally arise out of, or are connected with the injury complained of: And in actions for *mal-feasance*, they in general correspond with the end or design which the defendant had in view, and which has

^p 3 T. R. 766

^q *Id.* 768. *tamen quæra.*

has been previously stated in the declaration ; as in an action for *defamation*, the declaration states, that the defendant intending to injure the plaintiff in his good name, &c. spoke the words complained of; whereby the plaintiff was injured in his good name, &c. *Special* damages are either such as are superadded to general damages, arising from an act injurious in itself; or such as arise from an act indifferent in itself, but injurious in its consequences: And in either case, they must be specially laid in the declaration, or the plaintiff will not be allowed to give them in evidence at the trial. Thus in an action for defamation, though the words be in themselves actionable, yet the plaintiff is not at liberty to give evidence of any loss or injury he has sustained by the speaking of them, unless it be specially laid in the declaration^r. If an action be brought for words that are not in themselves actionable, and the plaintiff do not prove the special damage laid in the declaration, he must be nonsuited, because the special damage is the gist of the action; but where the words are of themselves actionable, if the words be proved, the jury must find for the plaintiff, though no special damage be proved^s.

The declaration in general concludes, to the *damage* of the plaintiff of a certain sum of money,
and

^r Bul. Nl. Pri. 7

^s Id. 6.

and therefore he brings his suit, &c. But in a *penal* action, brought by a common informer, where the plaintiff's right to the penalty accrues upon bringing the action, it is not necessary to conclude in this way, as the plaintiff cannot have sustained any damage by a previous detention of the penalty ^t. In actions against *attornies* and officers of the court, it is usual, though not necessary ^u, for the plaintiff, instead of bringing suit, to *pray relief*, &c. And where the action is brought by bill against a *member* of the house of commons, the bill concludes with a prayer of process to be made to the plaintiff, according to the statute, &c. It was anciently necessary to find *pledges* to prosecute, and add their names to the declaration by *bill* ^v: but they are now holden to be mere matter of form, and may be found at any time before judgment ^w.



The *Qualities* of a declaration are first, that it correspond with the process; secondly, that it contain all the circumstances necessary to maintain the action, and no more; thirdly, that these circumstances be set forth with certainty and truth ^x.

The

^t 4 Bur. 2021. 2490.

4 & 5 Ann. c. 16. § 1. Fort.

^u Andr. 247.

330. Cas. *temp.* Hardw. 315.

^v 9 Edw. IV. 27. Bro. Barnes, 163. 1 Wils. 226.
Abr. tit. *Bill*, 15. tit. *Pledges*, 2 Wils. 142. 3 T.R. 157.
11. Dyer, 288.

^x Co. Lit. 303. a. Pl. Com.

^w 18 Edw. IV. 9. 2 Hen. 84. 122.

VII. l. 17. Palm. 518. Stat.

The declaration should regularly correspond with the process, in the *names* of the parties; the description of the *character* in which they sue, or are sued; and, except on common process by *bill*, in the nature of the cause of action. But where process is taken out against a defendant by a wrong name, the misnomer may be cured by amending the writ, if there be any thing to amend by, and then declaring against the defendant by his right name ^y; but in doing this, the court will take care that it shall not operate to the prejudice of the sheriff ^z. Or if the defendant appear by his right name, the plaintiff may declare against him by the name in which he appears, stating that he was arrested, or served with process, by the other; for by appearing, the defendant admits himself to be the person sued, and so the variance is immaterial ^a. But as a man cannot have two christian names, it has been holden on a plea in abatement, that the plaintiff cannot declare against the defendant in his right name, with an *alias* of the name he is sued by ^b. And on process not bailable, if the defendant do not appear, the plaintiff cannot rectify the mistake by appearing

^y 2 Bos. & Pul. 109.

Robinson, H. 23 Geo. III.

^z *Id. ibid.* And the court would not grant a rule for amending the writ, under which the defendant had been arrested by a wrong name, after actions of false-imprisonment had been brought for such arrest. Anon. M. 41 G. III.

Boyne v. Mills, M. 25 Geo. III. 3 T. R. 611. 1 Bos. & Pul. 645.

^b Willes, 554. "But the defendant being sued by the name of *Jonathan otherwise John Soans*, is no cause of demurrer to the declaration; for *non constat* that it is not all one christian name." 3 East, 111

^a 2 Wils. 393. *Green* and

appearing for him, in his *right* name, according to the statute ^c: Though if the plaintiff were to appear for the defendant in the name by which he is sued, it seems that this would warrant him in proceeding to judgment and execution ^d.

Upon *general* process, the plaintiff may declare *qui tam*, or as *executor* or *administrator*, &c. But this rule will not hold *è converso*; for where the process was to answer the plaintiff *qui tam* ^e, &c. and the declaration was in his own name only, omitting the *qui tam* part, the court held the variance to be fatal, and set aside the proceedings ^f. In a subsequent case, the proceedings were set aside, where the process was to answer the plaintiffs as *assignees* of a bankrupt, and the declaration was in their own right; for the plaintiff cannot declare against the defendant generally, on process sued out in a special character ^g. So where a writ was sued out by the plaintiffs as *executors*, and the declaration was by them *in their own right*, it was deemed a sufficient variance for discharging the defendant out of custody on filing common bail ^h.

The

^c 3 T. R. 611. But if a defendant be served with process by a *wrong* christian name, and afterwards the plaintiff enter an appearance for him, and serve him with notice of declaration by his *right* name, and proceed to judgment and execution, the court will not set aside the proceedings for irregularity, merely on the ground that the defendant never appeared; because he ought to have plea-

ded such misnomer in abatement. 3 East, 167.

^d 2 Str. 1218.

^e *Id.* 1232. 2 Blac. Rep. 722. 3 Wils. 141. S. C.

^f 4 Bur. 2417. 6 T. R. 158.

^g *Meggs* and another, assignees of *Cochran*, v. *Ford*, E. 25 Geo. III.

^h 8 T. R. 416. and see 1 Bos. & Pul. 383.

The plaintiff may declare in chief, upon common process by *bill*, for any cause of action whateverⁱ: And in *bailable* cases, the court will not permit a defendant to take advantage of a variance, in the amount of the debt, between the *ac-etiam* part of the *latitat* and the declaration^k. But where the plaintiffs, having held the defendant to bail on an affidavit in *assumpsit*, delivered a declaration in *trover*, the court ordered an *exoneretur* to be entered on the bail piece^l. By *original*, the plaintiff must declare in chief, for the same cause of action as is expressed in the writ^m. And if there be a variance between the original-writ and declaration, the court will discharge the defendant, on entering a common appearanceⁿ: But they will not on this ground set aside the proceedings; for that would be permitting the defendant to do indirectly, what the practice of the court will not allow him to do directly, by craving oyer of the original-writ, and pleading the variance in abatement^o.

The rules of pleading, as has been frequently observed, are founded in good sense; their objects are precision and brevity: nothing is more desirable for the court than precision, nor for the parties than

ⁱ R. E. 15 Geo. II. Reg. R. 27. 1 H. Blac. 310.

1. Cowp. 455.

^m R. H. 8 Car. I. 5 T. R.

^k 5 T. R. 402. but see 2 402.

East, 305.

ⁿ 6 T. R. 363.

^l 7 T. R. 80. and see 8 T.

^o *Id.* 2 Wils. 393.

than brevity^p. Precision or *certainty* is of three kinds; first, to a common intent; secondly, to a certain intent in general; thirdly, to a certain intent in every particular^q: The second, or that which is to a certain intent in general, is all that is required in a declaration; and it ought to be such that the defendant may answer it, a good issue be joined thereon, and the court be enabled to give judgment^r. This certainty should pervade the whole declaration; and is particularly required in setting forth the time, place, and other circumstances necessary to maintain the action^s. But that which is alleged by way of conveyance or inducement to the substance of the matter, need not be so certainly alleged, as that which is the substance itself^t: And *surplusage* will not vitiate, except where it defeats the action^u.

If the declaration be defective in any of the above particulars, the defendant may demur: But if he do not, the defect may in some cases be aided by the defendant's *plea*, or by a *verdict* for the plaintiff. If the declaration want time, place or other circumstances, it may be aided by the defendant's plea; but not if it be defective in substance:

^p Doug. 666, 7.

C. 18, &c. And as to *time*

^q Co. Lit. 303. a. and see

and *place*, see 5 T. R. 607.

Cowp. 682. Doug. 158, 9.

^t Co. Lit. 303, a.

^r Co. Lit. 303. a. Pl.

^u Com. Dig. Tit. *pleader*.

Com. 84.

C. 28, 9

^s Com. Dig. tit. *Pleader*,

stance ^v: And a verdict will aid the omission of that which was necessary to be proved at the trial, and without which the jury could not have found for the plaintiff ^w. Defects in the declaration are also frequently cured by the statutes of *jeofails* ^x.

The declaration itself was formerly delivered to the defendant's attorney, who made a *copy* of it, and then delivered it back ^y: But the copy is now made, on a treble-penny stamped paper, by the plaintiff's attorney ^z; and either *delivered* to the defendant's attorney, or *filed* with the clerk of the declarations, in the King's Bench office. Where the defendant has appeared or filed bail, a copy of the declaration should be *delivered* to his attorney ^z; who should pay for the same, after the rate of *four-pence per sheet*, computing seventy-two words to a sheet, together with the stamps or king's duty ^a, and *four-pence* for the warrant of attorney ^b: In such

^v 8 Co. 120. b.

the statute 12 Geo. I. c. 29.

^w Com. Dig. tit. *Pleader*, C. 87. and see Doug. 654.

and the rule upon that statute, of T. 1 Geo. II.

⁷ T. R. 518. 583.

^a R. T. 12 W. III. and

^x 32 Hen. VIII. c. 30.

note (a).

18 Eliz. c. 14. 21 Jac. I.

^b R. M. 5 Ann. Reg. 2.

c. 13. 16 & 17 Car. II. c. 8.

But the plaintiff cannot sign judgment, for the defendant's

^y R. T. 12 W. III.

refusing to pay *four-pence* for the warrant of attorney, where the copy of the declaration is delivered to him. 4 T. R. 370.

^z R. T. 2 Geo. II. But see 8 Mod. 379. and 2 Ld. Raym. 1407. by which this rule appears to have been made in T. 11 Geo. I. before

such case, a delivery to the party himself is not good^c. But where the defendant has not appeared or filed bail, or the defendant's attorney, or his clerk in his absence, refuses to pay for a copy of the declaration, or if the abode of the defendant's attorney be unknown to the plaintiff's attorney, the copy should be *filed*, with the clerk of the declarations, in the King's Bench office; and notice thereof given without delay, to the defendant or his attorney; it being irregular for the plaintiff, when the defendant's place of residence is known to him, to stick up a notice of declaration in the office^c.

When the declaration is *delivered*, a notice to plead should be indorsed on it^d: But this indorsement does not seem to be necessary, when the declaration is *filed* in the office^e. In that case, a *notice* of declaration should be delivered to, or left at the last or most usual place of abode of the defendant, or his attorney: which notice should express the nature of the action, at whose suit it is prosecuted, and the time limited by the rules of the

^c Lofft, 332.

^d R. T. 12 W. III. R. T. 2 Geo. II. In the common pleas, notice of declaration is not necessary in bailable actions. 2 Bos. & Pul. 42. And if a declaration be indorsed "to plead in ——" it must be understood to mean within

the number of days allowed by the rules of the court. *Id.* 363.

^e 7 T. R. 26.

^f Append. Chap. XVIII. § 18, 19.

§ 1 Sel. 239. Barnes, 226, 7 but see Barnes, 310.

the court for pleading; and in that case the defendant do not plead by such limited time, judgment will be entered against him by default^h. Where the declaration filed in the office, before the defendant's appearance, was indorsed "*filed conditionally*," and judgment afterwards signed for want of a plea, the court held it regular; though the notice served on the defendant was of a declaration *generally*ⁱ.

If the declaration be *filed*, and notice thereof given to the defendant or his attorney, it is deemed to be a good declaration, from the time of such notice only^k; and therefore a rule to plead in such case, given before notice of declaration, is irregular^l. Yet, where the declaration was filed on the last day of the second term after the return of the writ, but the notice was not given till a little before the essoin-day of the following term, this was holden to be well enough; the master certifying it to be the practice^m. The defendant must always receive and pay for a copy of the declaration, whether it be delivered or left in the office, before he can be admitted to pleadⁿ,
and

^h R. T. 1 Geo. II. and 298.

see Append. Chap. XVIII.
§ 20, 21.

ⁱ 8 T. R. 77.

^k R. T. 1 Geo. II. R. T. 112.

2 Geo. II. 8 Mod. 379. 2
Ld. Raym. 1407. 7 T. R.

^l Pr. Reg. 131. Cas. Prac
C. B. 111. Barnes, 248. S. C.

^m 3 Bur. 1452. 2 T. R.

ⁿ R. T. 12 W. III. R. M.

10 Geo. II. Reg. 3

and if he neglect to do so, the plaintiff's attorney may refuse to accept his plea, and sign judgment °.

Where the defendant has appeared or filed bail, or the plaintiff has entered an appearance, or filed bail for him, according to the statute, the declaration must be delivered or filed *absolutely*. But it cannot be so delivered or filed, *before* appearance or bail; as the defendant till then is not in court^p: Still however, for the sake of expediting the cause, by making the times for appearance and pleading concurrent, it is provided that “ upon all process, returnable before
“ the *last* return of any term, where no affidavit is
“ made or filed of the cause of action, the plaintiff
“ *may*^q file or deliver the declaration *de bene esse* or
“ *conditionally*, at the return of such process, with
“ notice to plead in *eight* days after the filing or
“ delivery thereof; and if the defendant do not file
“ common bail and plead within the said eight days,
“ the plaintiff having first filed common bail for him,
“ may sign judgment for want of a plea: And that
“ upon all such process as aforesaid, where an affidavit is made and filed of the cause of action, the
“ declaration may be filed or delivered *de bene esse*,
“ at the return of such process, with notice to plead
“ in *four* days after such filing or delivery, if the
“ action

° Wils. 173.

^p Lofft, 333. 2 T. R. 719.

^q But he is not bound to do

so. *Carmichael against Troutbeck*, T. 24 Geo. III. *Ante*,

247, 8.

“ action be laid in *London* or *Middlesex*, and the
 “ defendant live within twenty miles of *London*; and
 “ in *eight* days, if the action be laid in any other
 “ county, or the defendant live above twenty miles
 “ from *London*; and if the defendant put in bail, and
 “ do not plead in due time, judgment may be signed :
 “ Provided the declaration in either case be filed or
 “ delivered, and notice thereof given, *four* days
 “ exclusive before the end of the term, and a rule to
 “ plead be duly entered^r. ”

Upon process returnable the *last* return of the term, the declaration cannot be filed or delivered *de bene esse*; nor can it be so filed or delivered, upon

^r R. T. 22 Geo. III. and see R. M. 10 Geo. II.

^s See the Rules of Mich. 10 Geo. II. and Trin. 22 Geo. III. It has been said by a gentleman, to whose labours the profession are greatly indebted, that the operation of these rules of court is not to confine declarations *de bene esse* to process returnable as therein mentioned, but only to regulate the time wherein the defendant is to *plead* to such declarations, on process so returnable: That the plaintiff may declare *de bene esse* upon any process, whenever returnable; but if it be not return-

able before the last return of the term, the notice to plead must not be in four or eight days, as mentioned in the rules, (since those rules do not extend to such declarations *de bene esse*), but the defendant will in that case be entitled to an imparlance, and the notice should be to plead within the first four days of the next term. 1 *Sel. Pr.* 242, 3. And this idea is certainly sanctioned by the case of *Abbey v. Martin*, reported in 1 H. Blac. 533. But with great deference, I conceive that the declaration cannot regularly be filed or delivered

de

upon process returnable on any other return, *after* the defendant has appeared or filed bail ^s; or after the time for his appearance is expired ^t. Where the defendant has neglected to appear, or file *common* bail in due time, the plaintiff must enter an appearance, or file common bail for him, according to the statute; and then file or deliver his declaration *absolutely*: And where the neglect is of putting in or perfecting *special*

de bene esse, unless the process be returnable before the *last* return of the term, for the following reasons; first, that at common law, a declaration could in no case have been filed or delivered, till the defendant had appeared, or was in custody; appearance being the first act of the defendant in court, and declaring against him the first act of the plaintiff, after appearance: See Com. Dig. tit. *Pleader*, C. 1, 2, 3. Secondly, that the practice of declaring *de bene esse* seems to owe its origin to a series of rules, the first of which in this court was made in Michaelmas, 10 Geo. II. At least, I have not been able to find any rule, or mention of such a practice in this court, previous to that time: Thirdly, that by those

rules, the practice is expressly confined to process returnable before the *last* return of the term: And lastly, that the intent of them was to expedite the cause, by enabling the plaintiff in town, to proceed to trial at the sittings in or after the term in which the process is returnable, or in the country, at the next assizes: but this end could not be attained, unless the process were returnable before the last return; the defendant not being obliged to plead till the next term, unless the declaration be filed or delivered *de bene esse*, and notice thereof given, four days exclusive before the end of the term, and a rule to plead duly entered.

^t 1 Bur. 56. Barnes, 342.

2 T. R. 720. 6 T. R. 548. Pr. Reg. 145, 6.

special bail, the plaintiff must proceed against the sheriff, or his bail upon the bail-bond.

If the plaintiff do not declare in due time, he is liable to be *nonprossed*, or have judgment signed against him, for not prosecuting his suit ^u. But unless the defendant's attorney take advantage of the plaintiff's neglect, by signing a judgment of *nonpros*, the plaintiff may declare by *bill*, at any time within a *year* next after the return of the process ^v. The judgment of *nonpros* ^w or *nonsuit*, for want of a declaration, is a final judgment, and signed with the clerk of the judgments, in the King's-Bench office; an *incipitur* being first made on a roll, and on a sheet of paper, called a judgment-paper, stamped with a double half-crown stamp. In actions by *bill*, it is founded on the statute 13 *Car. II.* stat. 2. c. 2. § 3. by which it is enacted, that “ upon an appearance “ entered for the defendant by *attorney*, of the term “ wherein the process is returnable, unless the plain-
“ tiff

^u Append. Chap. XXXIX. § 51, &c

^v 2 T. R. 112. 3 T. R. 123, 4. 5 T. R. 35. But see 12 Mod. 217. R. M. 10 Geo. II. *Reg.* 2. (b). *contra*.

^w It is called a judgment of *nonpros*, from the words *non prosequitur*, &c. formerly used in entering it up. And this

seems to be the proper appellation of the judgment, in actions by *bill*; but in actions by *original*, where the language of the judgment was *non prosequitur breve vel sec-tam*, it is more commonly called a judgment of *nonsuit*. *Ante*, 363, &c.

“tiff shall put into the court from whence the pro-
 cess issued, his bill or declaration against the de-
 fendant, in some personal action or ejectment of
 farm, before the end of the term next following
 after appearance, a nonsuit for want of a declara-
 tion may be entered against him; and the defen-
 dant shall have judgment to recover costs against
 the plaintiff, to be taxed and levied in like manner
 as upon the 23 Hen. VIII^x.” The provisions of
 this statute are confined in terms, to cases where the
 defendant has been arrested; but it has been holden,
 that if a defendant appear at the day of the return of
 the process, and put in bail, though he never were
 arrested, nor the process returned, yet if the plaintiff
 do not declare within *two* terms, a *nonpros* may be
 entered against him^y: And the statute is not confin-
 ed to cases, where the writ is defective, but has al-
 ways been construed to extend to cases in general^z.
 Hence it is a rule, that on *all* process issuing out of
 this court, returnable at a day certain, if the defen-
 dant appear by his attorney, and file bail of the term
 wherein the process is returnable, and the plaintiff
 do not declare before the end of the term next fol-
 lowing, a *nonpros* may be signed, without enter-
 ing any rule to declare, or calling for a declara-
 tion.

^x Chap. XV.

S. C.

^y 2 Salk. 455. 7 Mod. 32.

^z 7 T. R. 27.

tion ^a. But a *nonpros* can never be signed, unless bail be filed as of the term wherein the process is returnable ^b; and therefore it cannot be signed, where a prisoner is superseded for not declaring, &c. on filing common bail ^c.

In a joint action, it is said, the plaintiff cannot be *nonpros'd* by one or more of the defendants, without the others ^d. And this is universally true in actions by *original*, where the plaintiff cannot proceed against the defendants severally, upon a joint writ. But upon process in *trespass*, if the plaintiff declare, serve a notice of declaration, or even take out a rule for further time to declare, against one or more of several defendants, and do not proceed against the others, the latter may sign a judgment of *nonpros* ^e. In *trespass* however, there ought to be but one judgment of *nonpros* for all the defendants, unless the plaintiff have indicated his intention of proceeding against them severally; for the trespass is joint, and though the plaintiff may declare severally, yet it remains joint, till it be severed by the declaration ^f.

Wherever the defendant obtains a judgment of
nonpros,

^a R. M. 10 Geo. II. Reg. 2.

^d Doug. 169.

(b). Gilb. K. B. 345.

^e 2 T. R. 257.

^b *Holmes v. White*, E. 11 Geo. III. *Ante*, 214.

^f 2 Salk. 455. Com. Rep. 74. S. C. 4 Bur. 2418. Vin.

^c Imp. K. B. 415. 1 Crompt. 127. 5 T. R. 35.

Abr. tit. *Costs*, 6 V. 341. *contra*.

nonpros, he is, as a necessary consequence, entitled to *costs* ^g; for which he may either take out execution, or bring an action of *debt* upon the judgment. It has even been holden, that an *executor* is liable to pay costs, upon a judgment of *nonpros* ^h. And the court, in two cases, have ordered the costs to be paid by the plaintiff's attorney; in one of them, at the instance of the *defendant*, upon an affidavit that the plaintiff could not be found ⁱ: and in the other, at the instance of the *plaintiff* himself, where his attorney refused to proceed, without being furnished with money ^k.

If the judgment of *nonpros* be *regular*, the court will not set it aside, as a matter of course; and in a *quittam* action, they have refused to do so ^l. But it may be set aside on motion, if *irregular*, with all the proceedings that have been had upon it: And if an action be brought on the judgment, the whole proceedings may be set aside by one rule ^m. A judgment of *nonpros* cannot regularly be signed, pending an injunction ⁿ. And where it was signed for not adjourning an *essoin*, cast upon a special *capias*, and the plaintiff took no notice of it, but delivered his declaration,

^g Stat. 23 Hen. VIII. c. 15.

^k Say. Rep. 172.

^h Eliz. c. 2. 4 Jac. I. c. 3. 13

^l 1 Bur. 401.

Car. II. stat. 2. c. 2. 1 T. R. 373.

^m 4 T. R. 688.

^h 3 Bur. 1584.

ⁿ *Bowser v. Price*, E. 20

Geo. III.

^l Str. 402.

declaration, and after the rule to plead was out, and a plea called for, signed judgment; the court, considering it as a trick, declared that as there was no colour for the *essoins*, or to expect the plaintiff to search after a *nonpros*, and there was no notice given of it, the plaintiff was right to go on; and therefore they refused to set aside his judgment °.

° 2 Str. 1194.

CHAP.

CHAPTER XIX.

Of IMPARLANCE, and TIME for PLEADING; and of the RULE to plead, and DEMAND of a Plea, &c.

THE plaintiff having declared, the defendant is allowed a certain time to prepare for his defence; and that either with, or without an imparlance.

Imparlance is said to be, when the court gives a party leave to answer at another time, without the assent of the other party^a; and in this sense, it signifies time to reply, rejoin, surrejoin, &c. But the more common signification of imparlance is time to plead^b: and it is either *general*^c, without saving any exception to the defendant, which is always to another term^d; or *special*, which is sometimes to another day in the same term^e, with a saving of all exceptions to the writ, bill, or count; or of all exceptions whatsoever: which latter is called a *general-special* imparlance. The *general* imparlance is of course, where the defendant is not bound

^a Com. Dig. tit. *Pleader*, 183. 211. 4 Bac. Abr. 27, 8. D. 1. 3 Blac. Com. 301.

^b 2 Mod. 62. 2 Show. 310. ^d 6 Mod. 28.

Barnes, 346.

^e *Id.* 8. 10 Mod. 127. Com.

^c Hardr. 255. 1 Lutw. 46. Dig. tit. *Pleader*, D. 1.

12 Mod. 529. S. C. Gilb. C. P.

bound to plead the same term; but a *special* imparlance is not allowed, without leave of the court ^f.

After a *general* imparlance, the defendant can only plead in *bar* of the action ^g; and cannot regularly plead to the *jurisdiction* of the court ^h, in *abatement* ^h, or a *tender* and *touts temps prist*. It is then also too late to claim *conusance* ^h, or demand *oyer* of a deed ^h, &c. After a *special* imparlance, the defendant may plead in abatement ⁱ, though not to the jurisdiction of the court. And where the defendant pleaded a misnomer in abatement, after an imparlance, thus; "And A. " B. who was arrested by the name of A. C. comes, " &c." the court in one case held this to be tantamount to a special imparlance ^k: But this case has since been over-ruled, by a subsequent determination ^l. After a *general-special* imparlance, the defendant may not only plead in abatement of the writ, bill, or count, but also *privilege* ^m, which is a plea to the *person* of the defendant, affecting the *jurisdiction* of the court ⁿ. But he cannot plead a *tender* and *touts temps prist*, after any kind of imparlance ^o; for by
craving

^f R. E. 5 Ann.

^h 5 Mod. 335.

^g 4 Bac. Abr. 29. Gilb. C. P. 184.

^o 4 Bac. Abr. 28. Gilb. C. P. 184. Sty. P. R. 465.

^h *Vide post*. Chap. XXIV.

2 Lil. P. R. 37. 1 Sid. 365.

ⁱ 1 Lutw. 6.

2 Mod. 62. 2 Salk. 622. 1

^k 1 Blac. Rep. 51. 1 Wils. 261. S. C.

Ld. Raym. 254. Carth. 413,

^l 4 T. R. 520.

14. S. C. 1 Lutw. 238, 9.

^m 1 Lev. 54. Hardr. 365. 1 Lutw. 46. 12 Mod. 529. S. C. Gilb. C. P. 185. 211.

R. E. 5 Ann. (a). R. T. 5 & 6 Geo. II. (b). but see Dy-
er, 300. Freem. 134.

craving time, he admits he is not ready, and so falsifies his plea. A *tender* must therefore be pleaded before imparlance, of the same term with the declaration; unless the declaration be delivered or filed so late, that the defendant is not obliged to plead to it that term: and then it may be pleaded of *course*, within the first four days inclusive of the next term ^p, or even afterwards, on a judge's order, as of the preceding term ^q.

If the defendant plead in abatement after a *general* imparlance, to the jurisdiction of the court after a *special* imparlance, or a *tender* after any kind of imparlance, the plaintiff may sign judgment ^r, or apply to the court by motion to set aside the plea ^s, or he may demur thereto ^t, or allege the imparlance in his replication, by way of *estoppel* ^u; but if the plaintiff, instead of taking any of these advantages, reply to the special matter of the plea, the fault is cured ^v.

Formerly, the defendant had always an imparlance to the term next after the return of the process, unless the proceedings were by *original* ^w,
upon

^p 1 Bur. 59.

^q Barnes, 343. 351. 355.
357. 359. 361, 362.

^r 4 T. R. 520. and see 7
T. R. 298. 447. (d).

^s 6 T. R. 373.

^t Sty. P. R. 465. 3 Inst.
Cler. 40. 1 Wils. 261. 1 Blac.

Rep. 51. S. C. *Green v. Sim-*
mester, H. 27 Geo. III. 6 T. R.
369. 2 Bos. & Pul. 384.

^u 1 Lutw. 23. 3 Inst. Cler.
39.

^v 1 Vent. 236.

^w Skin. 2. but see 8 Mod.
228.

upon a *habeas corpus*, for or against *attornies* or other privileged persons, or against *prisoners* in custody of the marshal ^x. On proceedings by *original*, if the action were laid in *London* or *Middlesex*, and the defendant appeared before the *last* return of the term; or if the action were laid in any other county, and the defendant appeared the *first* return of *Hilary* or *Trinity* term, or before the *third* return of *Michaelmas* or *Easter* term; no imparlance was allowed, without consent or special rule ^y. So upon a *habeas corpus*, returnable in *Michaelmas* or *Easter* term, if the declaration were delivered before the *third* return, the defendant was not entitled to an imparlance ^z. And where the proceedings were for or against *attornies* or other privileged persons ^a, or against *prisoners* in custody of the marshal ^b, the defendant was bound to plead, without any imparlance, the same term the declaration was delivered, if delivered *four* days exclusive before the end of the term. Afterwards, the time was narrowed for pleading upon a *latitat*, &c. ^c, and it became a rule, that where the cause of action was specially expressed in the process, the defendant should not have liberty of imparling, without

^x R. M. 5 Ann. III. (a). 752.

Gilb. K. B. 310. Gilb. C. P. ^a 2 Salk. 517. 6 Mod. 175.
43. 182. 4 Bac. Abr. 27. R. E. 5 W. & M. III. § 3. (a).

^y R. M. 1654. § 15.

and see R. M. 5 Ann. III. (a).

^z 1 Mod. 1. 2 Salk. 515.

^b R. H. 2 Geo. II.

¹ Wils. 154. and see 6 T. R.

^c R. M. 5 Ann. reg. 3.

without leave of the court; but should plead within the time allowed, by the course of the court, to defendants sued by original-writ^b. And at length it was determined, that even upon a special *capias* by original, the defendant should not be obliged to plead sooner than upon a common *latitat*^d.

The former distinctions upon this subject being thus gradually abolished, it is now settled^e, that in all cases, where the defendant has appeared, and filed common bail, or put in and perfected special bail, or the plaintiff has appeared and filed common bail for him, according to the statute, and the declaration is delivered, or filed and notice thereof given, four days *exclusive* before the end of the term in which the writ was returnable, if the venue be laid in *London* or *Middlesex*, and the defendant live within twenty miles of *London*, the declaration should be delivered or filed *absolutely*, with notice to plead within *four* days; or in case the action be laid in any other county, or the defendant live above twenty miles from *London*, within *eight* days *exclusive*^f after the delivery or filing thereof: and the defendant must plead accordingly, without any imparlance; or in default thereof, the plaintiff may sign judgment. If the declaration be delivered or filed, with notice to plead within the *first* four
 - days

^d 1 Str. 684.

^f *Id.* (a).

^e R. T. 5 & 6 Geo. II.

days of term, the defendant has all the morning of the *fifth* day to plead; and judgment cannot be signed, for want of a plea, till the opening of the office, in the afternoon of that day^g: But in any other part of the term, if the defendant do not plead within the four days, the plaintiff may sign judgment, in the morning of the fifth day^g. And if a plea be not put in on the day the rule expires, and the other party do not take advantage of it immediately, the defendant may deliver his plea, at any time before judgment is actually signed against him^h.

Where the defendant has not appeared, or filed bail, the ruleⁱ is, that “ upon all process returnable “ before the *last* return of any term, where no affidavit is made and filed of the cause of action, “ the plaintiff may file or deliver the declaration *de bene esse*, at the return of such process, with notice to plead in *eight* days *exclusive*^j after the “ filing or delivery thereof;” being the same time as is allowed for the defendant to appear and file common bail^k: and “ if the defendant do not file common bail, and plead within the said eight days, “ the plaintiff, having filed common bail for him, “ may sign judgment for want of a pleaⁱ.” But if the

^g *Shephard v. Mackreth*, E. the former rule of M. 10
35 Geo. III. K. B. Geo. II. Reg. 2.

^h 1 T. R. 16. 4 T. R. 195, ^j *Id.* (a).

6. 5 T. R. 35.

^k *Ante*, 212, 13.

ⁱ R. T. 22 Geo. III. and see

the declaration be not filed until *after* the return of the process, the defendant has *eight* days to plead from the time of filing it, whenever it may be¹. And “ upon all such process, where an affidavit is made “ and filed of the cause of action, the declaration “ may be filed or delivered *de bene esse*, at the re- “ turn of such process, with notice to plead in *four* “ days after the filing or delivery, if the action be “ laid in *London* or *Middlesex*, and the defendant “ live within twenty miles of *London*, and in *eight* “ days, if the action be laid in any other county, or “ the defendant live above twenty miles from *Lon-* “ *don*¹,” being the same time as is allowed for pleading, where the declaration is delivered or filed *absolutely*^m: and “ if the defendant put in bail, and “ do not plead within such times as are respectively “ before-mentioned, judgment may be signed¹.” But in all the foregoing cases, the declaration should be delivered, or filed and notice thereof given, *four* days *exclusive* before the end of the term, a rule to plead duly entered, and a plea demanded, when necessaryⁿ. If the defendant plead, before the bail are perfected, his plea may be considered as a nullity, although the bail afterwards justify^o.

Where

¹ 1 Bur. 56. *Delatre and Mango*, M. 20 Geo. III. R. M. 10 Geo. II *Reg.* 2. R. T. 22 Geo. III.

^m *Ante*, 421.

^o 4 T. R. 578. but see 2

ⁿ R. T. 5 & 6 Geo. II. (*b*). East, 406

Where the process is returnable the *last* return of the term ⁿ, or where it is returnable before, but the declaration is not delivered, or filed and notice thereof given *four days exclusive* before the end of the term ^p, the defendant, if completely in court, is entitled to an imparlance; and must plead within the first *four* days of the next term, provided the declaration be delivered, or filed and notice thereof given, before the essoin-day of that term: otherwise the defendant will be allowed to imparl to the subsequent term ^q. But if a writ be returnable the last day of one term, and the defendant do not justify bail until the fourth day of the next, he is not entitled to an imparlance to the third term, though the plaintiff do not declare *de bene esse* before the essoin-day of the second; the foundation of which is, that no laches can be imputed to the plaintiff, for not declaring until the defendant is perfectly in court ^r. And for the like reason, if a writ be taken out against two defendants, and one of them is arrested, or served with a copy of it, in the term of which it is returnable, but the other cannot be met with, so that it becomes necessary to take out another writ against him, returnable in the next term; as the plaintiff cannot declare till
both

^p R. T. 5 & 6 Geo. II. (b). ever is confined to cases where

^q Vidian's *Introd.* II. special bail is required. *Per*

^r 5 T. R. 372. 2 Bos. & Cur. M. 42 G. III.

Pul. 126. This practice how-

both defendants are in court, they are neither of them entitled to an imparlance, on account of the plaintiff's not declaring until the term in which the latter defendant is arrested, or served with process^r. So when a defendant removes the cause by *habeas corpus* from an inferior court, and the plaintiff does not declare until the next term, the defendant is not entitled to an imparlance; for such removals being in general considered as dilatory, it would only be adding to the delay, if an imparlance were granted^s.

If four terms have elapsed since the delivery or filing of the declaration, the defendant shall have a whole term's notice to plead^t, before judgment can be entered against him^u, unless the cause have been stayed by *injunction*^v or privilege; and the notice in such case must be given before the essoin-day of the term^w: but it does not extend beyond the term; and therefore a rule to plead may be entered, and judgment signed, in the vacation^x. This rule was established, for the purpose of preventing any surprise on the defendant, after the plaintiff has lain by four terms, without proceeding in his action; and therefore it does not apply, where

^s 6 T. R. 752. *Ante*, 351, 2. 71. 2 Blac. Rep. 784.

but see 2 Bos. & Pul. 137. ^w 2 Str. 1164. 1 Str. 211.

^t Append. Chap. XIX. § 1. *contra*.

^u R. T. 5 & 6 Geo. II. (b). ^x 2 T. R. 40.

^v *Id. ibid.* 2 Bur. 660. Doug.

where the proceedings have been delayed at the defendant's request ^y.

It remains to be observed, within what time the defendant must plead after changing the *venue*, demanding *oyer*, or *amending* the declaration. After changing the *venue*, the defendant must plead to the new action, as he should have done in the other, without delay ^z. After the delivery of *oyer*, the defendant shall have the same time in term to plead, or as many pleading days, as he had when he demanded it ^a. And if the plaintiff *amend* his declaration the same term, the defendant shall have *two* days, exclusive of the day of amendment, to alter his first plea, or plead *de novo* ^b: If the amendment be made in a subsequent term, the defendant is entitled to a new four-day rule to plead ^c.

If the defendant be not prepared to plead, by the expiration of the time allowed him for that purpose, his attorney or agent should take out a *summons*, and serve it upon the plaintiff's attorney or agent ^d, requiring him to attend a judge, and shew cause why the defendant should not have further time to plead: And in *trover* for goods, where the defence was that they had been sold by the plaintiff, the
court

^y 3 T. R. 530. and see 2 300, 301. 8 T. R. 356, 7.
Blac. Rep. 762.

^z R. M. 1654. § 5.

^a R. T. 5 & 6 Geo. II. (b).

¹ Str. 705. Prac. Reg. 28.

^b 1 Str. 705. and see R. M.

10 Geo. II. Reg. 2. (b).

^c 8 T. R. 87.

^d *Ante*, 47.

court gave the defendant time to plead, in order that he might obtain a discovery from the court of chancery ^e. When the summons is taken out, and made returnable, before the expiration of the time for pleading, it is a stay of proceedings, pending the application ^f; but it is otherwise when taken out, or made returnable, after the expiration of the time for pleading ^f: nor will it operate as a stay of proceedings, where the object of it is collateral to the time for pleading ^g, as to discharge the defendant out of custody upon common bail, &c.

The plaintiff's attorney or agent, on being served with the summons, either indorses his consent to an order being made upon it, attends the judge, or makes default. In the latter case, the defendant's attorney or agent, after waiting *half* an hour ^h, should take out a *second* summons, and after that a *third* (if necessary), which should be respectively served and attended as the first: And if default be made upon three summonses, the judge, on affidavit thereof, will make an order *ex parte*. But if any one of the summonses be attended, the judge will make an order upon, or discharge it, as he sees cause; and if he make an order
for

^e 2 T. R. 683.

144. S. C. Barnes, 254. Pr.

^f Say. Rep. 165. Barnes, Reg. 293. S. C.

240. 252. Cas. Prac. C. B. ^g *Per Cur.* M. 28 Geo. III.

137. Pr. Reg. 292. S. C. ^h R. T. 35 Geo. III. 6 T

Barnes, 255. Cas. Prac. C. B. R. 402.

for a *month's* time to plead, it is understood to mean a *lunar*, and not a *calendar* monthⁱ.

The order of a judge for time to plead, must be served in like manner as the summons: And it is either upon, or without terms. The usual terms are pleading *issuably*, rejoining *gratis*, and taking *short* notice of trial, or inquiry: And where the defendant is an *executor* or *administrator*, he must undertake not to plead any judgment obtained against him, since his time for pleading was outⁱⁱ; for otherwise he might confess judgments in the mean-time, and plead them in bar to the plaintiff's demand.

An *issuable* plea is a plea *in chief* to the merits¹, upon which the plaintiff may take issue, and go to trial²: Therefore, a plea in abatement is not an issuable plea³; nor a false plea of judgment recovered⁴; nor a plea of alien-enemy⁵, or other plea which does not go to the merits⁶. But a plea of tender has been deemed an issuable plea⁷; and also a plea of the statute of limitations⁸, or that a bail-bond was taken for ease and favour⁹. As to *demurrers*, there is a distinction between

ⁱ 3 Bur. 1455. 1 Blac. Rep.

450. S. C. and see 2 H. Blac.

35. 1 Bos. & Pul. 479.

^k 8 Mod. 308. and see 1 Bulst. 122, 3.

^l 7 T. R. 350. Barnes, 263.

^m 2 Bur. 782.

ⁿ 1 Bur. 59. Barnes, 263.

^o 1 Blac. Rep. 376.

^p 8 T. R. 71.

^q *Valle v. Gardiner*, H. 24

Geo. III. *Gillet and Ridley*, C.

B. and see 3 Bos. & Pul. 171.

^r 1 Bur. 59. Barnes, 263.

^s 3 T. R. 124. 1 Bos. & Pul. 228. 1 Blac. Rep. 35. 2

T. R. 590. *contra*.

^t 1 Bur. 605.

between a real and fair demurrer, and a demurrer without good cause ^u: The former is an issuable plea, within the meaning of a judge's order ^v; the latter is not, but only an evasion of it ^w. But where the defendant was advised that he had substantial ground of demurrer, the court set aside the judgment signed as for want of a plea, upon terms ^x. By rejoining *gratis* is meant, rejoining without the common four-day rule to rejoin ^y. *Short* notice of trial, in *country* causes, must be given at least *four* days before the commission-day, one day exclusive, and the other inclusive ^z: In *town* causes, *two* days notice seems to be sufficient ^a; but it is usual to give as much more as the time will admit of: The defendant however is not precluded by these terms, from demurring to the replication, if there be good cause ^b.

Where the defendant is under a judge's order to plead issuably, and pleads a plea which is not issuable, the plaintiff may consider it as a mere nullity, and sign judgment ^c: And where several pleas are pleaded, one of which is not issuable, it will vitiate all the others ^d. So where a defendant, under an order to plead issuably, puts in a sham demurrer

^u 3 Bur. 1788, 9.

^v 2 Str. 1185.

^w Say. Rep. 88. 7 T. R. 530.

1 East, 411. 2 Blac. Rep. 923.

2 Bos. & Pul. 446.

^x 7 T. R. 530. 1 East, 414.

(a). S. C.

^y Barnes, 271.

^z R. E. 30 Geo. III. 3 T. R. 660.

^a Pr. Reg. 390.

^b R. T. 5 & 6 Geo. II. (b).
2 Str. 1185.

^c *Valle v. Gardiner*, H. 24 Geo. III.

^d 3 T. R. 305.

rer to some of the counts in the declaration, and pleads issuably to the rest, the plaintiff may consider the whole as a nullity, and sign judgment as for want of a plea¹. But where it is doubtful whether the plea be issuable, the better away, in term-time, is to move the court to set it aside².



If a defendant be bound by rule of court, or order of a judge, to plead by a time therein limited, it is incumbent on him to do so, although the plaintiff do not enter any rule to plead, or call for a plea³. With this exception, the plaintiff must in all cases enter a *rule* to plead,* whether the defendant have appeared or not; and where the defendant has appeared, he must also *demand* a plea, before he can sign judgment.

The *rule* to plead is the order of the court⁴; and may be entered with the clerk of the rules, at any time after the delivery, or filing and notice of the declaration, in term-time; or if the declaration be delivered, or filed and notice given, four days exclusive before the end of the term, the rule to plead may be entered at any time during the first four days after term. The clerk of the rules will accept a rule to plead on the *essoin*-day, but such rule cannot be entered until the first day of term.

And

¹ 1 East. 411. Barnes, 314.

² 1 Bur. 59. 2 T. R. 320. 7 T. R. 530.

³ R. T. 5 & 6 Geo. II. (4).
Pr. Reg. 290, 291. Cas. Prac.
C. B. 67. 141. S. C.

⁴ Append. Chap. XIX. § 2.

* In the common pleas, a summons for further time to plead, not attended by the party taking it out, does not waive the necessity of a rule to plead.
3 Bos. & Pul. 150

And *Sunday* is a day within this rule, unless it be the last ⁱ. Anciently there were two rules given, of *four* days each; the first *ad respondendum*, the second *ad respondendum peremptoriè* ^k. These were afterwards converted into one *eight-day* rule ^l: but now, “*four* days only shall be allowed the defendant, from “the time of giving any rule to plead”;” which four days expire before, with, or after the time for pleading. If they expire before, the plaintiff must wait till the expiration of the time for pleading, before he can sign judgment for want of a plea: But if they expire with or after that time, “the plaintiff is at liberty to “sign his judgment, the day after the rule for pleading is out; the declaration having been regularly “delivered or filed, and the defendant or his agent “being called upon for a plea.”

When a rule to plead has been once entered, and the cause stands over to another term, without any further proceeding, a new rule to plead should regularly be entered in that term, to entitle the plaintiff to sign judgment; for all judgments must be entered the same term in which rules are given ^o. Where the declaration is *amended*, if a rule to plead be entered the same term the amendment is made, though

ⁱ 2 Salk. 624. 1 Str. 86.

^m R. T. 1 Geo. II. 2 Str.

^k Vidian's *Introd.* II. 2 Salk. 1192.

517.

ⁿ R. H. 2 Geo. II. *Reg.* 3.

^l *Id. ibid.*

^o Gilb. K. B. 318.

though before such amendment, it is sufficient^r; otherwise a new rule to plead must be entered. And where the plaintiff, after giving a rule to plead, has been delayed by *injunction*, he may sign judgment after the injunction is dissolved, without a new rule^q.

The *demand* of plea is a notice in writing from the plaintiff's attorney^r; and except where the defendant is in custody of the *sheriff*^s, &c. must be made in every case where the defendant has appeared^t, or filed common bail: And it may be made at the time of delivering the declaration^u. But before the defendant has appeared, or after the plaintiff has entered an appearance, or filed common bail for him, according to the statute^w, or where the defendant is in custody of the sheriff^x, &c. the demand of a plea is unnecessary. The plaintiff cannot sign judgment for want of a plea, till the expiration of twenty-four hours after it has been demanded, whether the time for pleading be
or

^r 2 Salk. 517, 18. 520. R. 341.

M. 10 Geo. II. Reg. 2. (b). ^u 6 T. R. 689.

Yates v. Edmonds, T. 35 Geo. ^v 1 T. R. 635.

III. ^w R. T. 1 Geo. II. 8 T. R.

^q 2 Bur. 660. Doug. 71. 2 465. Barnes, 249. 2 Bos. & Blac. Rep. 784. Barnes, 238. Pul. 218.

^r Append. Chap. XIX § 3. ^x 1 T. R. 591. 6 T. R. 525.

^s 1 T. R. 591. 6 T. R. 525. *Ante*, 317.

^t 1 Wils. 134. 1 Bos. & Pul.

or be not expired, when such demand is made^v: And if a plea be demanded on *Saturday*, the defendant has twenty-four hours to plead, after the demand, exclusive of *Sunday*^z. But judgment may be signed at any time after the twenty-four hours are expired, provided the time for pleading be then out; and therefore if the plea be demanded in the *morning*, the plaintiff is not obliged to wait until the opening of the office, in the *afternoon* of the following day^a.

^v 1 Blac. Rep. 50. 1 T. R. following day to plead; and if
454. 4 T. R. 118. In the Com- he do not plead within that
mon Pleas, the rule is, that time, the rule to plead being
after a plea has been demand- expired, the plaintiff may sign
ed, the defendant has in all judgment.

cases till the opening of the ^z 4 T. R. 557.
office in the afternoon of the ^a 1 T. R. 454

CHAPTER XX.

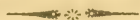
Of SETTING ASIDE PROCEEDINGS for IRREGULARITY: and of MOTIONS and RULES and the PRACTICE by SUMMONS and ORDER.

IN the defence of an action, one of the first things to be attended to, on the part of the defendant, is the *regularity* of the proceedings; for if they are irregular, the court on motion will set them aside.

An irregularity may be defined to be, the want of adherence to some prescribed rule or mode of proceeding; and it consists, either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unreasonable time, or improper manner. Thus, the want of *notice* is an irregularity, whether it be to process, upon a declaration, or of trial or inquiry; so, if the notice be not given in due time, or a proper manner. An interlocutory judgment, for want of a plea, is irregular, when it is signed either before the time for pleading is expired, or after a plea has been properly pleaded. And in general it may be remarked, that whenever the proceedings are irregular, the court on motion will set them aside.

aside, provided the application for that purpose be made in the first instance: for in all cases of irregularity, the party should apply to the court as early as possible; and if he either proceed himself, after discovering the irregularity, or lie by and suffer the other party to proceed, the court will not assist him ^a.

There are some distinctions however, deserving notice, between a mere irregularity, and a complete defect in the proceedings; the former may be waived by the adverse party, but not the latter ^b: For a mere irregularity, the court will only set aside the proceedings that are irregular, leaving the plaintiff at liberty to continue his suit from the last regular proceeding ^c; but for a complete defect, the proceedings are stayed *in toto*: On setting aside proceedings for irregularity, the party complained of is in general liable to the payment of costs ^d; but on staying them as defective, the costs are in the discretion of the court.



As it is frequently necessary, in the course of a suit, to apply to the court, it may be proper, before we proceed further, to say somewhat of *motions* and of the *rules* or *orders* of the court thereon.

A motion

^a 3 T. R. 7. 10. 5 T. R. 1 Bos. & Pul. 383. (a). 2 Bos. 254. 464. *Per Cur.* T. 40 G. & Pul. 110. 589.

III. 1 East, 77. 330. 1 Bos. ^c *Holloway v. Whaley*, T. 41 Geo. III.

& Pul. 250. 344. ^d Cas. *templ.* Hardw. 314.

^b 5 T. R. 254. 3 East, 155.

A *motion* is an application for a rule or order of the court; and it is either for a rule *absolute* in the first instance, which is sometimes moved for in court, and sometimes drawn up on a motion-paper signed by counsel, and delivered to the clerk of the rules; or it is only for a rule to shew cause, or as it is commonly called, a rule *nisi*, unless cause be shewn to the contrary, which is afterwards moved to be made absolute.

Rules are of four kinds; first, such as are given by the *master*, *filazer*, or *clerk of the papers*; by the *master*, to reply, rejoin, surrejoin, &c. to enter the issue, for the defendant to produce the record, or for a trial by *proviso*, &c.; by the *filazer*, to declare or appear, on the removal of a cause by *pone* or *recordari*, &c.; or by the *clerk of the papers*, to return the paper-book. Secondly, such as are given by the *clerk of the rules*, as a matter of course, on a *præcipe* or note of instructions made out by the attornies who apply for them; and are not founded on any motion in court, either real or supposed: Of this kind are rules to plead, and rules for judgment on *postea*s, or writs of *scire facias*. Thirdly, such as were anciently moved for by the attornies at side-bar, and are thence called side-bar rules: Of this nature are the rules for time, or further time to declare; for the sheriff to return the writ, or bring in the body; to be present at taxing costs; to discontinue; or for a *scire facias* to revive a judgment

judgment under ten, and above seven years old, &c. These rules may be had at the office of the clerk of the rules, at any time either in term or vacation. Fourthly, such rules as are, or are supposed to be moved in court; which are either common or special. Rules, it has been said, are not records, but only remembrances, not entered on the rolls of the court^e. And if a rule of court be produced under the hand of the proper officer, there is no need to prove it to be a true copy, because it is an original^f.

Motions and rules are either on the plea-side, or on the crown-side of the court. Of the latter kind is the rule for an *attachment*, which may be moved for on account of contemptuous words, spoken of the court (*a*)^g, or its process (*n*); for a rescue (*n*), or disobedience to a *subpœna* (*n*), or other process (*n*); against the sheriff, for not obeying a peremptory rule to return a writ (*a*)^h, or to bring in the body (*a*); against an attorney, for not performing his undertaking (*n*), or otherwise misbehaving himself (*n*)ⁱ; and against other persons, for non-payment of costs, on the master's *allocatur*

^e 1 Wils. 40.

^f 1 Ld. Raym. 745.

^g R. T. 17 G. III. N. B. In classing the different motions, the letter (*a*) is used to denote that the rule is *absolute* in the first instance; the letter (*s*) that it is drawn up on the *sig-*

nature of counsel; the letter (*c*) that it cannot be had without *consent*; and the letter (*n*) that in the first instance, it is only a rule *nisi*.

^h R. T. 17 G. III.

ⁱ *Ante*, 58, 9.

allocatur (*a*), or not performing an award, &c. (*n*). The rule for an attachment for non-payment of costs, on the master's *allocatur*, is absolute in the first instance, unless it be for costs in pursuance of an award^k; but where it is for the non-payment of money generally, or of money and costs, it is only a rule to shew cause^l. And a rule *nisi* for an attachment, for non-payment of money pursuant to the master's *allocatur*, cannot, we have seen, be served on a Sunday^m.

Motions and rules on the plea-side, where an action is depending, are made on behalf of the *plaintiff*, or of the *defendant*. On behalf of the *plaintiff*, they are either for something to be done in the common and ordinary course of the suit; as to increase issues (*a*), to discharge the rule for changing the venue (*a*), for a *concilium* (*s*), or judgment (*a*), on demurrer, special verdict, or a writ of error; for leave to enter up judgment on an old warrant of attorneyⁿ, or *nunc pro tunc* (*n*); to enter up

^k *Thompson v. Billingsley*, T. 37 G. III.

^l *Per Buller* Justice, M. 24 G. III. 1 Bos. & Pul. 477.

^m 8 T. R. 86. *Ante*, 191.

ⁿ This rule is absolute in the first instance, unless the bond be above *twenty* years old, and then it is a rule *nisi*; but where, upon such a bond,

the party had admitted the debt within two months preceding the motion, the court granted it absolute in the first instance. *Blakely v. Vincent*, T. 35 G. III. If the warrant of attorney be not above *ten* years old, an application may be made to a judge in vacation, for leave to enter up the judgment

up judgment and take out execution, after a verdict for the plaintiff, against one of several underwriters, where the rest have agreed to be bound by it (*n*); for a *scire facias*, to revive an old judgment^o; or to take out execution pending a writ of error, &c. (*n*); to amend the pleadings, or other proceedings in the course of the suit (*n*); or to set aside a judgment of *non pros* (*n*), non-suit (*n*), verdict (*n*), or inquisition (*n*): Or they are for something to be done out of the common and ordinary course of the suit; as that the money deposited with the sheriff, and paid into court under the statute 43 Geo. III. c. 46. § 2. may be paid over to the plaintiff, for the defendant to abide by his plea (*s*), to refer it to the master to assess the damages, without a writ of inquiry (*n*), for the execution of a writ of inquiry before a judge (*n*), or to have a good jury upon the execution of such a writ (*a*); for a trial at bar (*n*), or in an adjoining county (*n*); for a view (*s*)^p, or special jury (*s*);
to

judgment, on an affidavit of the due execution of the warrant of attorney, that the debt or part of it is still due, and that the parties are living. But in this case, it seems that the affidavit ought to be filed with the clerk of the rules.

^o If the judgment be under *seven* years old, the plaintiff may sue out a *scire facias*, as a matter of course, without any rule or motion: If it be above *seven* years, but under *ten*, he cannot have a *scire facias*, without a side-bar rule. 2

Salk. 598. If it be above *ten* years old, but under *twenty*, there must be a motion under counsel's hand, supported by an affidavit that the judgment is unsatisfied: *Id.* And if the judgment be of more than *twenty* years standing, there must be a rule to shew cause, on a similar affidavit. *Blakely v. Vincent*, T. 35 G. III. *Walters v. Hales*, E. 37 G. III.

^p In *trespass*, the rule for a view is drawn upon a motion-paper signed by counsel; but in other actions, it is moved for

to have witnesses examined on interrogatories (*c*); for leave to inspect and take copies of books, court-rolls ^a; &c. or to have them produced at the trial (*n*), or that the plaintiff may be allowed his costs of suit, in an action on a judgment (*n*). See the statute 43 Geo. III. c. 46. § 4. So the plaintiff may have a rule *nisi*, for the defendant to produce a deed before the commissioners of the stamp-office, to be stamped; and also to give the plaintiff a copy of the deed, in order that he may declare thereon ^r.

On behalf of the *defendant*, motions and rules may be considered as they arise, and succeed one another, in the course of the suit. In general, they are to quash the writ (*n*), to discharge the defendant out of custody on common bail (*n*), that the bail-bond may be delivered up to be cancelled (*n*), to justify bail (*a*), reverse an outlawry (*n*), or that the money deposited with the sheriff, and paid into court under the statute 43 Geo. III. c. 46. § 2. may be repaid to the defendant, on his duly putting in and perfecting bail in the action (*n*), or, after several rules for time to declare, that the plaintiff declare peremptorily (*a*): to set aside an interlocutory judgment, or other proceedings for *irregularity* (*n*); or if they are *regular*, to set aside the judgment, upon an affidavit of merits (*n*), or to stay the proceedings upon terms, in actions upon bail-

for in court; and in some cases is only a rule to shew cause.

^a If the rule be moved for on behalf of a *copyhold* tenant of the manor, it is absolute in the first instance, on

the signature of counsel; 3 T. R. 141. otherwise it is a rule to shew cause. See 7 T. R. 746.

^r *Cooke v. Stocks*, M. 36 G. III.

bail-bonds (*n*)^s, or in other actions, where the debt sued for appears to be under forty shillings (*n*), or the action is brought or conducted upon bad or defective grounds (*n*), contrary to good faith (*n*), or without proper authority (*n*); or that they may be stayed, pending a writ of error (*n*), until security be given for the payment of costs (*n*), or until the costs are paid of a former action for the same cause (*n*): to compound penal actions (*c*), change the venue (*a*)^t, consolidate actions (*n*), or strike out superfluous or unnecessary counts (*n*); for time to plead, or reply, &c. under special circumstances (*n*); to plead several matters (*s*), or pay money into court (*s*); to withdraw the general issue, and plead it *de novo*, with a notice of set-off (*a*), or upon paying of money into court (*a*); to add or withdraw special pleas (*a*)^u; to put off a trial, if the defendant be not ready (*n*), or if the plaintiff will not proceed, for costs for not proceeding to trial (*a*), or inquiry (*a*), or for judgment
as

^s One motion may be made, in the *original* action, to stay all the proceedings on the bail-bond given in that action; and one rule in such case seems to be sufficient. *Nicklin v. Profit*, *Same v. Taylor*, and *Same v. Burley*, H. 37 G. III. K. B. 3 Bos. & Pul. 118. C. P. and *vide ante*, 250. (*x*).

^t The rule to change the venue into an *English* county, as being next adjoining to a *Welch* county, is a rule *nisi*. *Powell v. Wilkins*, M. 37 G. III. *Anon.* H. 37 G. III.

^u In the three last cases, the rule, though commonly absolute in the first instance, is sometimes only to shew cause

as in case of a nonsuit (*n*); in arrest of judgment (*n*); that the defendant may be allowed his costs of suit, where the plaintiff does not recover the amount of the sum for which the defendant was arrested, and had not any reasonable or probable cause for arresting him to that amount (*n*)*; or for a suggestion, upon the *Welch*-judicature-act, to entitle the defendant to a judgment of nonsuit (*n*)^v, or after a nonsuit or verdict, to entitle him to double or treble costs^w, &c. (*n*); to set aside an execution, and discharge the defendant, or restore to him the money levied, or to retain it in the sheriff's hands (*n*).

The defendant also, as well as the plaintiff, may move for a *concilium* (*s*), or judgment (*a*), on demurrer, special verdict, or a writ of error; to amend (*n*); for a trial at bar (*n*), or in an adjoining county (*n*); for a view (*s*), or special jury (*s*); to have witnesses examined on interrogatories (*c*); or for leave to inspect and take copies of books, court-rolls^x, &c., or have them produced at the trial (*n*); or to set aside a verdict (*n*), or inquisition (*n*). Either party may likewise move to make a judge's order, or order of *nisi prius*, a rule of court (*a*); to enlarge the time for making an award (*c*); to set aside an award (*n*), or judge's order (*n*); or for the master to make his report (*a*), or review his taxation (*n*).

There are some motions peculiar to the action of *ejectment*; such as for judgment against the casual ejector (*s*), or that service on the tenant's son or daughter,

^v 6 T. R. 500.

^x *Ante*, 440. (*q*).

^w *Prichard v. Peacock*, E.
25 G. III.

* See the statute 43 Geo. III.
c. 46. § 3.

daughter, &c. may be deemed good service (*n*); for the landlord to be admitted defendant, instead of the tenant (*s*), or for leave to take out execution in such case against the casual ejector, after the landlord has failed in his defence (*n*).

The motion for judgment against the casual ejector is founded on an affidavit of the service of the declaration in ejectment ^y, which should regularly be served on the tenant or his wife; it having been holden, that an affidavit of its being left with a servant, (the tenant and his wife being out of the way,) is not sufficient ^z. Service of a declaration in ejectment on one of two tenants in possession, seems to be good service on both ^a: But service of the declaration on a person appointed by the court of chancery, to manage an estate for an infant, has been deemed insufficient ^b. The tenant himself may be served any where: but it must appear that he is *tenant*; an affidavit of service on the *person* in possession of the premises being insufficient ^c. A declaration in ejectment may be served on the wife, either on the premises, or at the husband's house; and the reason why it is necessary to state in the affidavit, that the service

^y This affidavit may be made by the person who served the declaration, or by any one who was present and saw it served. 2 Bos. & Pul. 120.

^z *Per* Ld. Kenyon, M. 38 G. III.

^a 1 Bos. & Pul. 369.

^b *Id.* 385.

^c *Doe ex dem. Robinson v. Roe*, T. 35 G. III.

vice was on the wife at the husband's house, is to shew that they were living together as man and wife, and that by such service the husband may have notice of the proceedings^d. If the tenant or his wife refuse to receive the declaration, a copy of it should be left for them, or fixed on the premises: and if the tenant abscond, or keep out of the way, to avoid being served, a copy of the declaration should be delivered to one of his family; or if there be no one in possession, may be affixed on some conspicuous part of the premises.

Where there is any thing in the service of the declaration out of the common way, it should be mentioned to the court, on moving for judgment against the casual ejector; and if they are satisfied that the tenant has had notice of the declaration, they will make the rule for judgment absolute in the first instance; but otherwise they will grant a rule upon the tenant to shew cause, why the service should not, under the special circumstances, be deemed sufficient, and direct that service of the rule on the premises shall be good service^e. If the affidavit of service of a declaration in ejectment be defective, the court will give leave to file a supplemental affidavit^f: And
in

^d 6 T. R. 765. 1 H. Blac. 1181. 1 Blac. Rep. 290. 317.
644. 2 Bos. & Pul. 55. but ^f *Doe ex dem. Robinson v.*
see 1 Bos. & Pul. 384. *Roe*, T. 35 G. III.

^e 1 Str. 575. 2 Bur. 1116.

in certain cases, they will permit an amendment to be made in the notice, at the bottom of a declaration in ejectment^g. Where there are several tenants, only one rule is necessary, on a motion for judgment against the casual ejector; though the name of each tenant was separately prefixed to the notice served on him^h.

There are other motions, not necessarily connected with any action; as to set aside an *annuity* (*n*), and deliver up the securities to be cancelled, or to make a submission to *arbitration* by deed a rule of court, (*a*) &c.

By the *annuity* act, 17 Geo. III. c. 26. § 4. the court in which any action is brought for payment of the annuity, or judgment entered, have in certain cases, an *express* jurisdiction given them by motion, to stay proceedings on the judgment or action; and to order the deed, bond, instrument, or other assurance, to be cancelled, and the judgment, if any has been entered, to be vacated. And in other cases, not specially provided for by the above clause, where a warrant of attorney has been given to confess a judgment, or judgment has been entered up in this court, for securing the payment of an annuity, the court in virtue of their *general* jurisdiction, will enter into the validity of the warrant of attorney or judgment, upon motion;

^g 7 T. R. 460

^h *Id.* 475

motion; and if the provisions of the act have not been complied with, will vacate the warrant of attorney, or set aside the judgment ⁱ. But where an action was brought by executors, on a bond given by the defendant to their testator, for securing an annuity, and upon a plea of *non est factum*, they obtained a verdict and judgment, and levied execution thereon, the court held this not a case where they could give relief, upon a summary application under the annuity act, for a defect in the memorial ^j; for the act only meant to refer to such judgments on warrants of attorney, as were intended to be a part of the security for the annuity, and not to extend to cases, where a judgment is obtained in the ordinary course of law, on any instrument given for securing the same ^k.

Upon the *fourth* section of the act, the application to the court should be made by the person by whom the annuity is payable; but the court in one instance set aside a judgment entered on the annuity-bond, and execution sued out thereon, for a defect in the memorial, upon the application of a judgment-creditor of the grantor, with a view of letting in a subsequent judgment of his own ^l. In a subsequent case however, where the grantor of an annuity had assigned a lease for securing the payment of it, and afterwards

ⁱ 4 T. R. 694. 1 H. Blac.
659. 4 Bro. Ch. Cas. 310. 2
Vez. jun. 138. S. C. 6 T. R.
737.

^j 7 T. R. 495.

^k Per lord Kenyon, *id.* 496.

^l 5 T. R. 9.

afterwards sold his interest in the lease to a fair purchaser, it was holden that the latter was not entitled under the annuity act, to apply to the court to have the security delivered up to be cancelled, because the memorial required by the act was not duly registered ^m.

The courts are expressly authorised by the fourth section of the act, to order the *deed*, &c. to be cancelled, as well as to set aside the judgment, or stay the proceedings. But where the application is made to the general jurisdiction of the court, it seems that they will only vacate the warrant of attorney, or set aside the judgment or execution; and not make any order respecting the deeds, &c. which are declared by the act to be null and void to all intents and purposes ⁿ. And it is doubtful, whether all the deeds, &c. can be set aside, when one only is objectionable ^o.

The laches of the party applying does not of itself furnish an answer to the application ^p: But where it appeared that he had acquiesced in the payment of the annuity, and had lain by till the persons acquainted with the original transaction were dead, the court refused to interfere, and relieve him in a summary

^m 6 T. R. 403. but see 2 East, 563.

ⁿ 2 Vez. jun. 158. 6 T. R. 404. 739. 7 T. R. 253. 3 East, 500. but see 1 Bos. & Pul. 65. 482.

^o 4 T. R. 694. 4 Bro. Ch. Cas. 310. 2 Vez. jun. 154. S. C. *contra*. and see 6 T. R. 471.

^p *Grant v. Foleu*, T. 23 G. III.

mary way^q. So where an ejectment was brought to recover possession of lands extended under an *elegit*, upon a judgment confessed, which had been entered up on a warrant of attorney given for securing an annuity, it was holden to be too late for the grantor to object to the consideration of such annuity, upon a summary application for staying the proceedings after verdict in such ejectment; because he had an opportunity of making his defence to the action^r. And it seems that an annuity paid without objection for more than six years, shall be protected, by analogy to the statute of limitations, against any objection *dehors* the memorial, for a supposed defect of consideration, without strong reasons to the contrary^s. But where the objection to the annuity was, that some of the deeds were not witnessed by all the persons mentioned in the memorial, the court on application set aside the warrant of attorney, though at the distance of near twenty years, and after the principal parties and witnesses to the transaction were dead; the merits of such objection not depending on any testimony lost by the delay^t.

If a question respecting the validity of an annuity has been decided, by a court of competent jurisdiction, the court of king's bench will not suffer it to be agitated again, if the point has been directly

^q 5 T. R. 139. and see 8 T. R. 328. 2 East, 85. 565.

^s 2 East, 85.

^t *Id.* 563.

^r 7 T. R. 540.

directly determined; but that is not the case, where the question has only incidentally occurred, and has not been positively decided ^v. In a late case however, where, upon a previous application to set aside an annuity, for non-compliance with the requisites of the act, the rule was discharged upon discussion of the merits, the court would not entertain a similar application between the same parties, on the same state of facts, though grounded upon a new objection to the annuity, which was not before urged or considered ^v. And where a rule to shew cause is obtained in this court, for the purpose of setting aside an annuity or annuities, the several objections thereto intended to be insisted upon by the counsel, at the time of making the rule absolute, must be stated in the rule *nisi* ^w.

A motion is sometimes preceded by a *notice* ^x; and is in general accompanied with an *affidavit*. The *notice* of motion, though seldom necessary ^y, is frequently given, in order that the rule *nisi* may operate as a stay of proceedings, or to save time and expence, by affording the adverse party an opportunity

^u 6 T. R. 471. and see 8 T. R. 328. 2 East, 85. 565.

^v 7 T. R. 455. and see 7 T. R. 540. 1 East, 455. 537. 2 East, 565, 6.

^w 2 East, 569.

^x Append. Chap. XX. § 1, &c.

^y The statute 14 Geo. II. c. 17. requires *notice* of motion, for judgment as in case of a nonsuit; but in this court, the rule to shew cause is deemed a sufficient notice. Lofft, 65. *Aliter* in C. B. 1 H. Blac. 527.

portunity of shewing cause in the first instance, or by inducing the court to disallow the costs of proceedings, had after the notice and before the motion. The *affidavit* should be made before the rule is moved for, and produced in court at the time of making the motion^z; and it should be properly entitled^a, and contain a full statement of all the circumstances necessary to support the application; and the rather, as it is a rule not to receive supplementary affidavits, on shewing cause, without leave of the court: but there is a diversity between affidavits which contain new matter, and where they tend only to confirm what was alleged and sworn when the rule was made; in the latter case, it seems they may be read, not in the former^b.

Motions and affidavits for attachments, in civil suits are proceedings on the plea-side of the court, until the attachments are granted, and are to be *entitled* with the names of the parties^c: but as soon as the attachments are granted, the proceedings are on the crown-side, and from that time the king is to be named as the prosecutor^d. The affidavits on a motion for leave to file a criminal information, ought not to be entitled; and if they are, cannot be read: the affidavits produced on
shewing

^z R. H. 36 G. III.

528. 2 Bos. & Pul. 516.

^a 2 Salk. 461. 2 T. R. 644.

^d 3 T. R. 133. 7 T. R. 439

^b 2 Salk. 461.

528. *Ante*, 262.

^c 3 T. R. 253. 7 T. R. 439

shewing cause may ^e, or may not ^f be entitled; but all affidavits made after the rule is absolute, must be entitled ^g. So where a submission to an award is made a rule of court under the statute, there being no action, the affidavits on which to apply for an attachment, for disobeying the award, need not be entitled in any cause; but the affidavits in answer must ^h: and the christian names as well as surnames of the parties must be inserted in the title of an affidavit, produced to shew cause against any rule ⁱ. An affidavit sworn before the attorney in the cause cannot be read ^k, except for the purpose of holding the defendant to special bail ^l: But this rule does not extend to the attorney's clerk; and therefore an affidavit may be taken before the clerk of the attorney in the cause, if such clerk be empowered to take affidavits ^m. And where an affidavit is made before a commissioner, by a person who from his signature appears to be *illiterate*, the commissioner taking the affidavit shall certify, or state in the *jurat*, that it was read in his presence, to the party making the same, who seemed perfectly to understand it, and wrote his signature in the presence of the commissioner ⁿ. It is also a rule, that upon every affidavit sworn in this court, or before
any

^e 1 Str. 704. Andr. 313.

^f 6 T. R. 60.

^g *Id.* 642.

^h 3 T. R. 601.

ⁱ 7 T. R. 661

^k 3 T. R. 403.

^l *Ante*, 155.

^m 8 T. R. 638.

ⁿ R. F. 31 G. III. 4 T. R.

934.

any judge or commissioner thereof, and made by two or more deponents, the names of the several persons making such affidavit shall be written in the *jurat*; and that no affidavit be read or made use of, in any matter depending in this court, in the *jurat* of which there shall be any interlineation or erasure^o.

An attachment for non-payment of costs, and against the sheriff for not returning the writ, may be moved for the *last* day of term^p. But the master's report cannot be moved for on that day, without previous leave of the court, except in extraordinary cases, and upon personal service of the notice^q. And a motion for a rule to answer the matters of an affidavit cannot be made on the last day of term^r, or on any motion which would operate as a stay of proceedings, unless it appear to the court that, under the circumstances, it could not have been made earlier^s. So the court will not, on the last day of term, hear a motion for a rule *nisi* to set aside an award^t; nor can counsel be heard on that day, to shew cause against such a rule, but the same must be enlarged, and made a peremptory for the next ensuing term^u.

The last day of the term is not a day for side-bar rules; but if the party was entitled to such a rule before,

^o R. M. 37 G. III. 7 T. R.
82.

^s *Leader v. Harris*, M. 37
G. III.

^p 1 Bur. 651. 5 Bur. 2686.

^t *Nettleton v. Crosby*, H. 38

^q 1 Blac. Rep. 311. *Per* G. III.

Cur. T. 40 G. III.

^u R. M. 36 G. III.

^r 4 Bur. 2502

before, he may take it out on the last day of term, dated as of the preceding day. A *prohibition* is not in general grantable the last day of term: but a rule may be obtained on motion, to stay proceedings till the ensuing term ^v; and in one instance it was granted on motion the last day of term, leave having been obtained the day before, to move it then ^w. A rule *nisi* for a criminal information may be granted at the end of a term, against a magistrate, for mal-practices during the term; but not for any misconduct before the term ^x. And Mr. Justice *Twisden* used to cite the book of *Edw.* IV. and say, they were to hear no law the last day of term ^y.

The rule to shew cause is drawn up for a particular day in term, appointed by the clerk of the rules, according to the place where the transaction appears to have happened, upon the face of the affidavits on which the rule was obtained, and so as to allow the party called upon sufficient time to answer the application: If in town, the rule is usually drawn up for the *fourth* day, exclusive of the day of obtaining it; if in the country, for the *sixth* day in near, or for the *tenth* day in distant counties, unless it be otherwise ordered by the court. And previous to the day of shewing cause, the rule should be duly served. To bring a party
into

^v Latch, 7. 2 Rol. Rep. 456.

^x 7 T. R. 80.

^w 3 Bur. 1922.

^y 2 Salk. 624.

into contempt, a copy of the rule must be *personally* served, and the original at the same time shewn to him ^z: In other cases, the same degree of strictness is not required in the service of the rule; but it is sufficient, without shewing the original, to leave a copy of it with any person representing the party, at his dwelling-house or place of abode. The rule however, we may remember, must be served before ten o'clock at night ^a. And when a rule is obtained, to set aside proceedings for irregularity, and to stay proceedings in the mean time, the proceedings are suspended for all purposes, till the rule is discharged ^b: therefore where the plaintiff took an assignment of the bail-bond, pending a rule to shew cause why it should not be given up to be cancelled, on the defendant's filing common bail, the court set aside the assignment, as having been made too soon.

On the day appointed for that purpose, the counsel for the party called upon by the rule may shew cause against it, either upon or without an affidavit, made and filed by the party shewing cause, as circumstances require. But an office-copy must be first taken of the rule, and of the affidavit upon which it was granted ^c, or otherwise counsel cannot be heard: And in all cases, where a special time is
limited

^z 3 T. R. 551. and see 8 T. 132. *Ante*, 48, 9.
 R. 86. that it cannot be served ^b 4 T. R. 176.
 on a *Sunday*. ^c R. M. 9 G. II.

^a R. M. 41 G. III. 1 East,

limited in any rule, before which any affidavit is required to be filed, no affidavit filed after that time can be made use of in court, or before the master, unless it appear to the satisfaction of the court, that the filing of such affidavit within the time limited, was prevented by inevitable accident^d. Previous to shewing cause, it is usual to deliver over the affidavit to the counsel for the rule, who has a right to make any objection arising on the face of it; and if a doubt arise, upon the statement of the facts contained in the affidavit, it is inspected by the judges, or read by the officer of the court. When an affidavit has been made use of, but not before,* it should be filed with the clerk of the rules, in order that it may be used as evidence, if necessary, on an indictment for perjury^e.

If cause be not shewn on the day appointed, the counsel for the party obtaining the rule may move, the next day, to make it absolute; which is done as a matter of course, if no cause be shewn, on an affidavit of service. But it frequently stands over, by consent of parties, or for the accommodation of counsel, till a subsequent day; when the counsel on either side may bring it on, by moving to make the rule absolute, or discharge it: though if not brought on or enlarged during the same term, it is of no effect, unless revived, as it may be, in
any

^d R. M. 36 G. III.

^e 7 T. R. 315.

* *From the Addenda to the London edition.* " This appears to be too general; for though it be true of affidavits made in *town*, yet with regard to *country* affidavits, it is otherwise; it being provided by the statute 29 Car. II. c. 5. that all affidavits sworn before the commissioners appointed by virtue of that act, shall be filed in the proper office of the court where the action or matter is depending, and *then* read: and by rule Mich. 9 Geo. II. K. B. it is ordered, that all such affidavits be brought to the clerk of the rules of this court to be filed, in such convenient time that copies of them may be duly made, and delivered to the party filing the same."

any future term, upon being served anew, and motion made to revive it: This is sometimes done, to save the expence of new affidavits, and obviate the objection of its being a second attempt after the first was abandoned.

When the counsel for the party obtaining the rule is not ready to support it, he may move to *enlarge* the rule till a future day, in the same or the next term; which is pretty much of course, when it is in his own delay; but otherwise the court will not enlarge the rule without consent, or some evident necessity: and they will never enlarge the plaintiff's rule, when it would have the effect of continuing the defendant in custody. In like manner, when the counsel for the party called upon by the rule is not prepared to shew cause against it, he may apply to enlarge the rule till a future day; which is a matter of right, if the rule was not served in time, so as to give the party an opportunity of answering it; but otherwise the court may impose upon him what terms they think proper; and they commonly require him to file his affidavits, so as to give the adverse party an opportunity of inspecting them, previous to the day appointed for shewing cause. In cases of urgency, the court, towards the end of the term, will sometimes enlarge the rule till a day in vacation, when it is to be brought on before a judge at chambers.

On

On shewing cause against the rule, the court either make it absolute, or discharge it; and that, either with or without the *costs* of the application, or such costs are directed to abide the event of the suit. When the proceedings are regular, and the application is made to the favour and indulgence of the court, the rule to shew cause is commonly made absolute, on payment of costs by the party applying; but when the proceedings are irregular, the rule to shew cause, why they should not be set aside, is commonly drawn up with costs, to be paid by the opposite party: And if the rule be made absolute generally, the party obtaining it is entitled, by the terms of the rule, to the payment of costs, which the master will tax; and if they are not paid on demand, the court on motion will grant an attachment. But if a rule *nisi* be granted for setting aside proceedings for irregularity, without saying with costs, and this rule be afterwards made absolute, no cause being shewn, it must be made absolute in the terms in which it was moved, without adding costs^f. And though the rule be drawn up with costs, yet the court in some instances will make it absolute without costs, in which case each party pays his own; or they will direct the costs to abide the event of the suit, in which case the party ultimately succeeding is entitled to them: And whenever a rule is drawn up with costs, and the
court

^f *Per Cur.* H. 37 G. III.

court do not mean the party should have them, they will mention it.

If, upon shewing cause, it appear that there was no ground or foundation for the rule, the court will discharge it, with costs to be paid by the party applying; and in all cases, where a rule is obtained to shew cause why proceedings should not be set aside for irregularity with costs, and such rule is afterwards discharged generally, without any special direction upon the matter of costs, it is understood to be discharged with costs, and the latter rule must be drawn up accordingly^g. But if there was any ground for the rule, and it is not drawn up with costs, the court will in general discharge it without costs; or they will sometimes order the costs to abide the event of the suit. And where nothing is said about costs in the rule, or by the court on making it absolute, or discharging it, they are considered as costs in the cause, and must be paid to the party ultimately succeeding, if the rule be made before judgment; but if it be not made till afterwards, they depend entirely on the rule; and if nothing be said therein concerning them, each party will have to pay his own costs. If a party obtain a rule to shew cause, requiring two things with costs, although he be clearly entitled to one, yet if he fail as to the other, he shall not have costs; for the adverse party was
under

under the necessity of coming into court to resist the latter.

Particular days are appointed for certain business; as *Tuesday* and *Friday*, which are called *paper-days*, for going through the paper of causes, wherein *conciliums* have been moved for, on the plea-side, and *Wednesday* and *Saturday*, for transacting business on the crown-side ^h. But no cause can be set down for argument on the first paper-day, or on the four last days of business in term: Yet, upon the day which would otherwise be the last paper-day, common things may be set down, unless it be the last day of term. All motions or rules in matters of length or consequence, are appointed for particular days, and called on first ⁱ. Special causes are to be entered with the clerk of the papers, at least *four* days exclusive of the day of argument ^k; of which notice should be forthwith given to the attorney or agent on the other side: and all such causes must be argued in the order they are entered, and not adjourned to any future day, by consent or otherwise; unless the court shall for reasonable cause, verified by affidavit, upon application made by either of the parties, their attorney

^h In the Common Pleas, it is a rule that all arguments upon demurrers, and other arguments, shall be heard on *Mondays* and *Thursdays* only. R. H. 42 G. III. C. P. 3 Bos. & Pul^l 110.

ⁱ Pref. to Bur. V.

^k See a former rule of E. 1658.

ney or agent, at least *two* days before the day of argument, otherwise order¹. The paper-books in causes entered with the clerk of the papers for argument on *Tuesday*, must be delivered to the chief justice, and the rest of the judges, on the *Saturday* preceding; and those entered for argument on *Friday*, must be so delivered on the *Tuesday* preceding²: And the exceptions intended to be insisted upon in argument, should be marked in the margin³.

Special cases from the assizes should regularly be set down for argument, within the four first days of the following term, and can never be set down for argument on any of the four last days of the term⁴. All rules enlarged till the next term are fixed for certain *peremptory* days⁵; and must be heard upon the respective days for which they are made peremptory, unless special ground by affidavit or otherwise, be shewn to the court, for postponing such rules⁶. And for enforcing this practice it is ordered, that no rules in causes entered in the peremptory paper be enlarged

¹ R. M. 30 G. II. 1 Bur. 52.

^m R. T. 40 G. III. 1 East, 131.

ⁿ R. E. 2 Jac. II. revived by R. H. 38 G. III.

^o *Per Lord Kenyon*, in the case of *Cutter v. Powel*, H. 35 G. III. *Lord Mansfield* wished to relax this, which is the old rule; but on consideration, the court in the above

case thought it right to adhere to it: And in M. 38 G. III. this rule not having been observed, the court directed it to be peremptory in future.

^p R. M. 30 G. II. H. 6 G. III. H. 15 G. III. M. 17 G. III. Pref. to Bur. V. 1 Bur. 9. 3 Bur. 1842.

^q R. H. 36 G. III.

enlarged during the term, or put off from the appointed day, by consent of counsel, or the attornies concerned therein, without previous application to, and special leave of the court^r. If a rule be drawn up wrong by mistake, the court will order it to be set right; or if made absolute, or discharged by surprise, they will open it. But it is a rule, that if any cause shall have been moved in court, in the presence of the counsel of both parties, and the court shall have thereupon made a rule between them, the same shall not be again moved contrary to such rule, under peril of an attachment^s.

In hearing motions, the course formerly was, to begin every day with the *senior* counsel within the bar, and then to call to the next *senior* in order, and so on, as long as it was convenient to the court to sit; and to proceed again in the same manner, upon the next and every subsequent day, although the bar had not been half, or perhaps a quarter gone through, upon any one of the former days; so that the *juniors* were very often obliged to attend in vain, without being able to bring on their motions, for many successive days^t. This practice bearing hard upon *junior* counsel, Lord *Mansfield* introduced a different rule, which has ever since been adhered to, of going quite through the bar, even to the youngest counsel,

^r R. E. 41 G. III. 1 East,
496.

^s R. H. 3 Jac. I.

^t 1 Bur. 57.

counsel, before he would begin again with the *seniors*; even though it should happen to take up two or more days, before all the motions, which were ready at the bar upon the first day, could be heard^u.

Where a matter comes before the court on a rule to shew cause, as on a motion for a new-trial, in arrest of judgment, or to quash an order of sessions, &c. all the counsel are heard on each side; the counsel who shew cause first, and then the counsel on the other side: If there are several counsel, the *senior* begins. Where a matter comes before the court on a rule for a *concilium*, as on a special verdict or special case, demurrer, writ of error, or motion to quash a conviction, &c. one counsel only (commonly the *junior*) is heard on each side; on a special verdict or special case, the counsel for the plaintiff begins first, or on a demurrer, writ of error, or motion to quash a conviction, the counsel for the party objecting: the counsel for the other party is then heard in answer, and the counsel who began first replies. After a special argument on a *concilium*, it is usual for the court to call upon each of the counsel concerned, to make a motion; which is called moving for their argument: but it seems that in this court, it is not the practice to call upon the counsel to move for their
argument

^u 1 Bur. 58.

argument as a matter of course, though it is said to be otherwise in the common pleas ^v. On motions for judgment without argument, on paper-days, one shilling is paid for each motion, by the counsel making it, to the box; which is called *box-money*, or *high-bar-money*, and paid by the secondary on the plea-side, into the hands of the clerk of the *junior* judge, in order to be by him paid over to the judges of the court in equal shares, to be disposed of by them for such charitable purposes as they in their discretion shall think proper ^w. On the last day of term, two shillings are paid for the first motion, and one shilling for every motion afterwards.



Analogous to these proceedings in court, is the practice by *summons* and *order*, at a judge's chambers, of which something has been already said in the preceding chapter. This practice seems to have arisen, partly from the overflowing of the business of the court in term-time, and partly from the necessity of certain proceedings being had in vacation, when the court is not sitting: And although extremely burthensome to the judges, yet it manifestly tends to the advantage of the suitor, the ease of the practitioner, and the general advancement of justice, by preventing the expence, trouble and delay which
would

^v 1 Wils. 76

^w R. T. 32, 33 G. II. 2 Bur. 867.

would ensue, if an application to the court were in all cases necessary. The order obtained upon a summons is however subject to an appeal, and the validity of it may be impeached two ways; either by moving the court to set it aside, or if made in vacation, by applying, in the next term, to set aside the proceedings that have been had under it ^x. But if the order be acquiesced under, it is as valid as any act of the court: And a judge's order for a prisoner's discharge under the Lords'-act, made out of term, has been held to be final ^y. Indeed, if it become necessary to enforce a judge's order by attachment, or other act of the court, there must be a previous motion to make it a rule of court ^z.

^x 4 Bur. 2569.

Kenyon, in *Curtis v. Taylor*, E.

^y Doug. 68.

35 G. III.

^z 4 Bur. 2569. *Per Lord*

CHAPTER XXI.

Of STAYING the PROCEEDINGS.

THOUGH the proceedings are regular, yet it sometimes happens that the cause of action is frivolous, or the action brought or conducted upon bad or defective grounds, contrary to good faith, or without proper authority: And in such cases, the court on motion will order the proceedings to be *stayed*, with or without costs, according to circumstances.

When the debt sued for appears, on the face of the declaration ^a, or is admitted by the plaintiff or his attorney ^b, or proved by the affidavit of the defendant ^c, to be under *forty* shillings, and the plaintiff may recover it in an inferior jurisdiction, the court on motion will stay the proceedings; it being below their dignity to proceed in such action. But an action cannot be brought in the county court, unless
the

^a 3 Bur. 1592.

^b 2 Blac. Rep. 754.

^c 4 T. R. 495. 5 T. R. 64.

White v. Griffiths, T. 35 G.

III. Formerly, when the plaintiff demanded more, the court would not permit an

affidavit to be read, that the defendant owed him less: Say.

Rep. 219. 240. 3 Bur. 1592.

but the practice has been since altered as above, agreeably to the usage of the Court of Exchequer

the cause of action arise, and the defendant reside within the county: therefore, though the demand be for less than forty shillings, if the cause of action arise in one county, and the defendant reside in another, the action may be brought in a superior court^d. And where a defendant, living within the jurisdiction of the court of requests for *Westminster*, was sued in this court for a debt under forty shillings, and neglected to take advantage of the statute 23 Geo. II. c. 27. by pleading it in bar, the court would not, after verdict for the plaintiff, either suffer a suggestion to be entered on the record, that the defendant lived within the jurisdiction, or stay the proceedings^e. So where a cause has been removed from an inferior court, this court will grant a *procedendo*, if the debt or damages appear to be under forty shillings^f: But the court refused to quash a *certiorari* upon this ground, in an action for an assault brought against excise-officers, who could not have an impartial trial in the inferior court^g.

In a *penal* action, on the 25 Ed. III. st. 4. c. 3. where the application was made in an early stage of the cause, the proceedings were stayed on motion, because no affidavit had been filed, that the offence

was

^d 6 T. R. 175. 8 T. R. ^f Brownl. *Brev. Jud.* 140.
235. 1 East, 353. (a). 2 H. 2 Brownl. 82. Moyle, 69.
Blac. 29. 1 Bos. & Pul. 75. Clift, 374.

^e 3 T. R. 452. 1 East, ^g 4 T. R. 499. *Ante*, 330.
354. (a).

was committed within the county where the action was brought, or within a year before the bringing of it, according to the 21 *Jac.* I. c. 4^h. But in a subsequent case, where the application was not made till after verdict, the court would not stay the proceedings, on a similar ground, in a penal action on the 21 Hen. VIII. c. 13. § 26. for non-residenceⁱ: And in the latter case it was holden, that the stat. 21 *Jac.* I. c. 4. does not control any of those statutes, on which penal actions are to be brought in the superior courts; but only applies to those, on which proceedings may, and ought to be had before justices of assize, justices of the peace, &c. The true rule seems to be, that on all penal laws antecedent to the stat. 21 *Jac.* I. c. 4. where the justices of assize and superior courts at *Westminster* have a concurrent jurisdiction, both as to the subject matter and mode of proceeding, the suit must be commenced before justices of assize and sessions, and not before the justices at *Westminster*: For though the statute 21 *Jac.* I. gives no new jurisdiction to inferior justices, yet it in terms takes away the jurisdiction of the courts at *Westminster*. But in suits on those statutes which give *debt*, &c. and mention not justices of assize or of the peace, they must be brought in the superior courts,

ⁱ 2 T. R. 274.

2 Str. 1081. 1 H. Blac. 546.

3 T. R. 362. and see

courts, otherwise there would be a defect of remedy^k.

In an action for bribery, on the 2 Geo. II. c. 24. the court will stay the proceedings, even after verdict, upon the clause of discovery^l; or if the action be not prosecuted without wilful delay^m. And the proceedings have been stayed in an action on the 18 Geo. II. c. 34. § 1. for keeping a gaming house; because, by a previous statuteⁿ, the penalty is payable on conviction, before a justice of the peace. Also, by the 26 Geo. III. c. 77. § 13. “if an action be commenced or prosecuted, for the recovery of any penalty or forfeiture, by virtue of any act relating to the *customs* or *excise*, unless the same be commenced and prosecuted in the name of the attorney-general, or some officer of the said revenues, the same, and all proceedings therein, are declared to be null and void; and the court shall not permit or suffer any proceedings to be had thereupon. And by the 36 Geo. III. c. 104. § 38. “it shall not be lawful for any person or persons to commence or enter, or cause or procure to be commenced or entered, or filed or prosecuted, any action, suit, bill, plaint, or information, for the
“ recovery

^k Willes, 635. (a). and *n*. 1.

^m 3 T. R. 5.

^l 4 Bur. 2287.

ⁿ 12 Geo. II. c. 28. § 1.

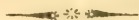
“ recovery of any penalty or penalties, inflicted by
 “ any of the laws touching or concerning *lotteries*, or
 “ by that act, unless the same be commenced, en-
 “ tered, filed, and prosecuted in the name of his
 “ majesty’s attorney general, in the court of *Exche-*
 “ *quer* at Westminster, if the offence shall be com-
 “ mitted in *England*; or in the name of his majesty’s
 “ advocate general in the court of exchequer in *Scot-*
 “ *land*, if the offence shall be there committed: And
 “ if any action, &c. shall be commenced or entered,
 “ in any other persons name or names, the same and
 “ all proceedings thereupon had are declared to be
 “ null and void; and the court where such proceed-
 “ ings shall be so commenced, shall cause the same
 “ to be stayed.”

But in a *qui tam* action for insuring lottery tickets,
 contrary to the 16 Geo. III. c. 34. the court would
 not stay the proceedings, upon an affidavit of the
 defendant, that a former action had been brought
 against him in the common pleas, for the same of-
 fence, in which he had had leave to compound; but
 said, he must plead such matter specially °. And the
 court would not stay the proceedings, in an action
 against a sheriff’s officer, on the 32 Geo. II. c. 28.
 § 12. though a similar action had been commenced
 against the sheriff, for the same offence^p: yet where
 actions had been brought against both, and a verdict
 obtained in each, the court stayed the proceedings.

ON

on payment of one penalty, and the costs in both actions ^q.

When an action is brought pending a reference, or otherwise contrary to good faith, the court will not suffer the plaintiff to proceed in it: And they will stay the proceedings, when the action is brought by an attorney, without proper authority; for otherwise the defendant might be twice charged ^r. So where an action was brought against an agent for prize-money, the court set aside the proceedings, with costs to be paid by the attorney; because the letter of attorney from the plaintiff, to receive the prize-money, was not duly attested, pursuant to the 20 Geo. II. c. 24. § 6 ^s.



There are other grounds of staying the proceedings; not absolutely, but for a time, or until something be done for the benefit of the defendant: These are, pending a writ of error; until security be given for the payment of costs; or until the costs are paid, of a former action for the same cause ^t.

A writ of error regularly sued out is a *supersedeas* of execution, from the time of its allowance ^u; provided bail, when requisite, be put in thereon in due

^q 2 T. R. 712.

^t But see 2 Bos. & Pul. 69.

^r 1 T. R. 62. 4 T. R. 577. 137.

^s *O'Hara v. Innes* M. 27 ^u 1 Salk. 321. 1 Bur. 340.
G. III. K. B.

due time^v: But this does not prevent the plaintiff from proceeding by action of *debt*, or *scire facias* on the judgment, against the principal; or by *scire facias*, or action of *debt* on the recognisance, against the bail. In such cases however, if the writ of error be not evidently brought for the mere purpose of delay, the court will stay the proceedings upon terms, pending the writ of error^w. But this is not a matter of course^x; and if it be apparent to the court, that the writ of error is brought merely for delay, they will not stay the proceedings^y. How that is to be made out, depends upon the circumstances of each particular case. In general, the court will not stay the proceedings, where the defendant or his attorney has declared, that the writ of error was brought only for delay, or used expressions tantamount to such a declaration^z: But the *belief* of the other party, that it is brought for delay is not sufficient^a; nor that the defendant had said to the plaintiff, that when he could put off the matter no longer, he would go to gaol^b.

Where a writ of error was brought on a judgment of *nonsuit*, the court in one case refused to set aside an execution, sued out after notice of its allowance;

^v 2 Str. 781. 1 T. R. 279. 437. Cowp. 72. *semò. contra.*

^w 1 Str. 419. 1 Wils. 120. 3 T. R. 79. 5 T. R. 714.

3 Bur. 1389. Cowp. 72. 3 T. 2 Bos. & Pul. 329.

R. 78. 3 T. R. 78.

^x 2 T. R. 78.

^b *Per Cur.* M. 41 G. III.

^y *Per Buller*, Just. 4 T. R.

ance; because the writ of error in such case, must evidently have been brought for the purpose of delay ^c. But in a subsequent case ^d, the court stayed the proceedings pending a writ of error, on a similar judgment; saying, that the practice not to stay proceedings, pending a writ of error, must be confined to those cases, where the party himself, or his attorney or bail have declared, that the writ of error was brought for delay.

On a judgment recovered in the common pleas, the defendants first brought a writ of error in this court, and then brought another, returnable in parliament, after which they *nonpros'd* the first writ of error, and then obtained a rule to shew cause, why the proceedings in an action upon the judgment brought in this court should not be stayed, pending the second writ of error, the court discharged the rule with costs; as it plainly appeared, from the defendant's own conduct, that there was no foundation for a writ of error, and that it could only be brought for vexatious purposes ^e. But the court will not permit execution to be taken out, pending a writ of error in parliament, on the ground that the writ of error is brought for delay, merely because the defendant suffered judgment to be affirmed in the exchequer-chamber, without any objection ^f. In *ejectment*, if there be judgment for the

^d 4 T. R. 456. 1 H. Blac. 432.

^e 2 T. R. 78.

^f 5 T. R. 669.

^g 6 T. R. 400

the plaintiff, and the defendant bring a writ of error, the court will not suffer the latter to proceed in a new ejectment, on the same title, till he has quitted the possession, or the tenants have attorned to the lessor of the plaintiff^g: And where a defendant in ejectment brought a writ of error in parliament, the court obliged him to enter into a rule, not to commit waste, during the pendency of the writ of error^h.

In order to stay the proceedings in an action of *debt* on judgment, pending a writ of error, it is necessary, if the action be bailable, that the defendant should be first in court, by putting in and perfecting bailⁱ. And where an action is brought upon a judgment of the court of common pleas, this court will not stay the proceedings, pending a writ of error, without the defendant's giving judgment in the second action^k, and undertaking not to bring a writ of error upon that judgment^l. But if the action be brought upon a judgment of this court, these terms make no part of the rule; because in general, actions on judgments are vexatious, and the plaintiff might have his execution on the first judgment^k. And where the proceedings were stayed without imposing these terms, and the
 plaintiff

^g 2 Salk. 258, 9.

R. 638.

^h 3 Bur. 1823.

ⁱ Cowp. 72. *Swann*

ⁱ 5 T. R. 9. 6 T. R. 455. *Boulton*, H. 35 G. III.

^k *Per Buller*, Just. 1 T.

plaintiff died before judgment affirmed, the court would not afterwards permit judgment to be entered *nunc pro tunc* ^m.

If the defendant bring a writ of error, and the plaintiff bring an action on the judgment and recover, he cannot sue out execution on the second judgment, till the writ of error be determined ⁿ. According to this decision, the plaintiff cannot be benefited by bringing an action on the judgment, pending a writ of error, except in cases where he may hold the defendant to special bail: and it is but of little service for the defendant to move the court to stay the proceedings in such an action; for if he let judgment go by default, the plaintiff cannot sue out execution.

On a *scire facias*, or action of *debt* on recognisance against bail, when a writ of error is allowed on the judgment in the original action, and the bail apply within their time for surrendering the principal ^o, the court will stay the proceedings, until the writ of error is determined ^p; the bail undertaking to pay the condemnation-money, or surrender the defendant into the custody of the marshal, within *four* days next after the determination of the writ

^m 1 T. R. 637.

183. Cas. Pr. C. B. 159.

ⁿ 3 T. R. 643. 4 Bur. S. C. Willes, 184. Barnes, 2454. S. P. but see 1 Str. 203. S. C. *semb. contra*. 526. Barnes, 202. Cas. Pr. ^o *Ante*, 235, &c. C. B. 129. S. C. Willes, ^p 1 Str. 419.

writ of error, in case the same shall be determined in favour of the defendant in error ^q. And in one case ^r, where the writ of error was allowed before the time was expired for surrendering the principal, though notice of such allowance was not given to the plaintiff's attorney, nor the application consequently made till after the expiration of that time, the court gave the bail the same terms as are usual when they apply within the time granted, by the course of the court, for surrendering the principal. But bail must be put in upon the writ of error, when necessary, before the application is made ^s. And in general, when the bail do not apply to stay the proceedings, pending error, till their time to surrender is out, the court will not give them any time for that purpose, but only four days to pay the money in, after the judgment is affirmed ^t.

Where error was not brought till it was too late for the bail to surrender, the court in one case would not stay the proceedings ^u. But in a subsequent case ^v, the proceedings were stayed; the bail undertaking to pay the condemnation-money, and the costs on the *scire facias*, in four days after affirmation; but in this case, there being no bail on the writ of error, the court made the bail also undertake

^q 1 Bur. 340.

^r *Id. ibid.*

^s 2 Str. 781.

^t *Id.* 872. 1270.

^u 1 Str. 443.

^v 2 Str. 877.

dertake to pay the costs on the writ of error, in case the judgment was affirmed; and said, it was a favour they were asking, and they would make them submit to equitable terms. By the affirmance of the judgment in these cases, is meant the final affirmance of it; and therefore where the judgment on a writ of error was affirmed in the exchequer-chamber, and afterwards another writ of error was brought, returnable in parliament, the proceedings against the bail were further stayed, till the determination of the second writ of error ^w.

The plaintiff got judgment on the *scire facias* against bail, pending error by the principal, and took them in execution; and on their moving to be discharged, the court said, though you might have applied, and had the proceedings stayed, yet we will not set them aside: if an action of *debt* had been brought upon the judgment, we should have granted an imparlance, if it had been asked; but we never set aside the judgment, when it is once signed, because we take it you, by your not applying in time, have submitted to meet the plaintiff. *Quod fieri non debet, factum valet* ^x.

In *ejectment* ^y, or actions *qui tam* ^z, where the lessor of the plaintiff, or plaintiff himself is unknown to the defendant, the latter may call for an account

^w 5 Bur. 2819.

3 T. R. 643. *semb. contra*.

^x 1 Str. 526. Barnes, 202.

^y 1 Str. 681.

accord. but see 4 Bur. 2454.

^z *Id.* 697. 705. Barnes, 126.

account of his residence or place of abode, from the opposite attorney; and if he refuse to give it, or give in a fictitious account, of a person who cannot be found, the court will stay the proceedings, until security be given for the payment of costs ^a. And in *ejectment*, where the lessor of the plaintiff is an infant ^b, resident abroad ^c, or dead ^d, the court will stay the proceedings, until a real and substantial plaintiff be named, or some responsible person undertake for the payment of costs. A similar undertaking is also required, in an action for the mesne-profits, brought in the name of the nominal plaintiff in *ejectment* ^e. And an uncertificated bankrupt, bringing an action of *trover* for the benefit of the assignees, has been required to give security for costs, in case he should fail in his suit ^f.

But except in *jectment* ^g, or actions *qui tam* ^h, it was not formerly usual to require security for costs,

^a For the notice of motion for this purpose, see Append. Chap. XX. § 4.

^b 1 Str. 694. 2 Str. 932. 1206. 1 Wils. 130. Cowp. 24. Barnes, 183. Bul. *Ni. Pri.* 112. but see Cowp. 128.

^c 2 Bur. 1177. Say. Costs, 153. S. C.

^d Barnes, 147.

^e Say. Rep. 78. Say. Costs, 154. S. C.

^f 7 T. R. 296. *Sanders v. Purse*, H. 35 G. III. accord.

But in *Sutton v. Sutton*, T. 38 G. III. the court doubted, and ordered the question to stand over till the following term. And see 1 East, 431. by which it seems that an uncertificated bankrupt is not in general required to give security for costs.

^g 2 Bur. 1177. Say. Costs, 153. S. C.

^h 1 Str. 697. 2 Str. 1206. 1 Wils. 266.

costs, where the plaintiff resided abroadⁱ: For it was considered, that such a proceeding might affect trade, by excluding foreigners from our courts; and would be a means of clogging the course of justice. But now, although a plaintiff is not compellable to give security for costs, merely as a foreigner, if he reside in this country^j; yet whether he be a foreigner or native, if he reside abroad, out of the reach of the process of the court, the proceedings may be stayed till his return, or security be given for the payment of costs^k: Upon this ground proceedings have been stayed, where the plaintiff has been resident in *Scotland*^l, or *Ireland*^m. If a foreigner sue two defendants, and only one of them put in bail, that one may require the plaintiff to give security for costs, without putting in bail for the other defendantⁿ: And a rule calling on the plaintiff who had left the kingdom, to give security for the costs, may be made after issue joined, and notice of trial^o. These are the only grounds upon

ⁱ 2 Str. 1206. 1 Wils. 266. must put in bail, previous to the application. 4 T. R. 697.
^j Say. Costs, 155. 2 Bur. 1026.
^k 1 Bur. 2105. Cowp. 24. 15. 322.

^l *Mingotti v. Drummond*, 36 Geo. III. *Sheriff v. Farquharson*, M. 37 Geo. III. S. P. but see 2 Bur. 1026.
^m 1 T. R. 362. *Still*

ⁿ 1 T. R. 267. 362. 491. *v. McIver*, M. 36 Geo. III.

2 H. Blac. 118. 2 Anstr. 359. ^o 6 T. R. 496.

The defendant in such case ^o *Id.* 597.

upon which the proceedings can be stayed, for want of security for costs: It being holden, that they shall not be stayed, even in a *qui tam* action, merely on account of the plaintiff's poverty^p; or in *ejectment*, where the lessor of the plaintiff is known, of full age, and resident in this country^q.

In a second *ejectment*, the court will stay the proceedings, until the costs are paid of a prior one, for the trial of the same title^r. And it matters not, whether the second *ejectment* be brought by the lessor of the plaintiff, or by the *defendant*, in the former one^s; or by or against all, or some of the parties^t; or for the same or different premises, so as they be part of the same estate^u; nor whether it be brought in the same or a different court: And the length of time which has elapsed, between the first and second *ejectment*, is not material^v; for there may be many good reasons why the defendant did not call for the costs sooner, such as the poverty of the other party, or a view to quiet any further

^p Cowp. 24. Barnes, 126.

^q 1 T. R. 491. and see

² H. Blac. 383. 1 Bos. & Pul.

96. 2 Bos. & Pul. 236 437.

^r 1 Salk. 255. 258, 9. 1

Str. 548. 554. 8 Mod. 225.

S. C. 2 Str. 1152. 1206.

1 T. R. 492. K. B. Pr. Reg.

174. Barnes, 133. 2 Blac.

Rep. 904. Say. Costs, 239.

S. C. 2 Blac. Rep. 1138.

1180. C. B.

^s 6 T. R. 223. 3 Bos. &

Pul. 22. S. P.

^t 6 T. R. 740. In a late

case, the proceedings were stayed, till the costs were paid of a former *ejectment*, brought by the father of the lessor of the plaintiff, against the defendant's father, on the same title. 8 T. R. 645.

^u 6 T. R. 740.

^v *Id.* 223. 740.

further controversy ^w. But the vexation of the party is said to be the ground of these rules ^x: And therefore, if there appear to be no vexation, the court will not make a rule for staying proceedings, until the costs are paid of a former ejectment ^y.

In other cases, it was not formerly usual to stay the proceedings, in a second action, until the costs were paid of a prior one, for the same cause ^z; and particularly, if the merits did not come in question, on the former trial ^a. But of late years, it has been done in several instances, on the ground of vexation ^b. And in this court, the practice is not confined to cases where a trial was had in the former action; but applies equally where the cause was put an end to, by judgment as in case of a non-suit ^c: And in one case ^d, where an action was brought by husband and wife, the court stayed the proceedings, until the payment of costs in a former action, at the suit of the husband only; it being for the same demand.

CHAP-

^w 6 T. R. 741.

^x 4 Mod. 379. 2 Str. 1152.

^y 4 Mod. 379. 1 Str. 681.

2 Str. 1099. 1121. Barnes, 180.

^z 2 Str. 1206. Cowp. 322. Say. Costs, 251. S. C. 1 T. R. 491, 2. K. B. Barnes, 125. C. B. but see 1 Vent. 100.

^a 1 Ld. Raym. 697. 2 Blac. Rep. 809.

^b 2 T. R. 511. K. B. Say.

Costs, 245. 247. 2 Blac.

Rep. 741. 3 Wils. 149. S. C.

C. B. but see 1 H. Blac. 10.

^c *Per Cur.* M. 41 G. III. but it is otherwise in the common

pleas; for that court never interferes, unless the merits of the case have been tried in the former action. 3 Bos. & Pul. 23. (a).

^d *Lampley & wife v. Sands,*

H. 25 Geo. III. K. B.

CHAPTER XXII.

Of COMPROMISING, and COMPOUNDING the ACTION.

WHEN the proceedings are regular, and cannot be stayed, on any of the grounds stated in the preceding chapter, the defendant in general, if he has no merits, either compromises the action, by paying or giving security for the debt and costs, compounds it, (if penal,) confesses it, or lets judgment go by default.

In actions for the recovery of a sum *certain*, where the parties are agreed as to the amount of the debt, it is of course to stay the proceedings, on payment of the same, together with the costs of the action^a: If the parties are not agreed, the defendant cannot move to stay the proceedings; but must either pay into court, on the common rule, what he conceives to be due, or let judgment go by default; and in actions for *general* damages, wherein the defendant cannot pay money into court, he has no option, but must let judgment go by

^a As to the costs of the declaration, and when allowed on staying proceedings in the common pleas, see 2 Blac. Rep. 749. 1 Esp. Cas. *Ni. Pri.* 345. 2 Bos. & Pul. 515. and see Append. Chap. XXII. § 1, 2.

by default, unless he can settle amicably with the plaintiff.

The practice of staying the proceedings, on payment of the debt and costs, though frequently confounded with, is in reality very different from that of bringing money into court, on the common rule; upon which the proceedings are not always stayed, but the plaintiff is at liberty to proceed at his peril, for more than the sum brought in. And the practice we are now treating of extends to every sort of action, brought for the recovery of a sum certain, as *assumpsit* or *covenant* to pay money ^b, and *debt* for rent, &c. ^c. If separate actions are brought against the acceptor, drawer, and indorsers of a bill of exchange, the court will stay proceedings against the drawer, or any of the indorsers, on payment of the bill, and costs of that action; but not against the acceptor, without payment of costs in all the actions ^d: And if the plaintiff proceed to judgment, the proceedings may still be stayed, on payment of the debt and costs ^e; but in that case, each defendant is only liable for his own costs, and the plaintiff cannot take out execution against one defendant, for the costs of another.

In *debt* for the penalty of five pounds, for killing a hare, with no other count, the court let the defendant

^b 8 T. R. 326. 410.

^d 4 T. R. 691.

^c Cas. temp. Hardw. 173

^e 1 Str. 515.

defendant bring in the penalty and costs^f. And in *debt* on bond, conditioned for the performance of covenants, or to account, indemnify, &c. the proceedings may be stayed, on payment of the whole penalty and costs^g. But in an action on a money bond, the court it seems will not stay the proceedings, but upon payment of what is justly due, though it exceed the penalty of the bond^h. We have already seenⁱ, in what cases the court will stay the proceedings, in actions upon bail-bonds: It will be sufficient to add in this place, that as the bail may render the principal, after an assignment of the bail-bond, and before they justify^k, so, when they have rendered him, the proceedings on the bail-bond may be stayed, on payment of costs^l, provided the plaintiff has not lost a trial. On staying proceedings, in an action of *debt* on recognisance, the bail above must pay the costs in that, as well as the debt and costs in the original action, though they apply within the time allowed them for surrendering the principal^m.

In

^f 2 Str. 1217.

^k 5 T. R. 401.

^g 2 Blac. Rep. 1190. 6 T. R. 303. 1 Atk. 75. 3 Bro. 529. 8 T. R. 222.

Chan. Cas. 489. 496. 1 Bos. & Pul. 337. ^m 5 T. R. 363. 3 Bos. & Pul. 13. *accord. Bartram* and

^h 2 T. R. 388. and see 7 T. R. 124. 446. 1 East, 436. *others v. Howell*, T. 31 Geo. III. K. B. *contra.* and see

ⁱ *Ante*, 248, 9

East, 306.

In debt on *bond*, conditioned for the payment of a less sum, it was usual for the court, even before the statute 4 Ann. c. 16. § 13. to relieve the defendant against the penalty of the bond, on payment of the principal, interest and costs; but then the whole penalty must have been brought into court, and when the plaintiff was satisfied, the defendant might have taken what remainedⁿ. By the above statute, it is enacted, that “if at any time, pending an action upon any such bond with a penalty, the defendant shall bring into court all the principal money and interest due on the bond, and also such costs as have been expended in any suit or suits in law or equity upon such bond, the said money, so brought in, shall be deemed and taken to be in full satisfaction and discharge of the said bond; and the court shall and may give judgment to discharge every such defendant of and from the same accordingly.” Upon this statute it has been holden, that in an action upon a bond, conditioned for the payment of money generally, without naming any day of payment, the court will refer it to the master to compute *interest*, as well as the principal and costs^o; interest being due on such a bond,

ⁿ 2 Salk. 597. 6 Mod. 101. for this purpose, see Appendix and see 3 Bur. 1370. Chap. XX. § 5.

^o For the notice of motion

a bond, though not expressly reserved^p. And the plaintiff is entitled to the costs of proceedings in equity, relating to the same matter^q; but not to the costs of a former suit, wherein the judgment has been reversed on a writ of error^r: for there is no reason, why the defendant should pay for the error or mistake of the plaintiff.

It was formerly holden, that this statute did not extend to an action of debt on bond, conditioned for the payment of an annuity, or of money by instalments^s. But it is now settled, upon the equity of the statute, that in such an action, where the defendant is *solvent*, the court will stay the proceedings, on payment of the arrears and costs, and giving judgment as a security for future payments, with a stay of execution till they become due^t. And where, in an action on an annuity-bond, it appeared that there were mutual accounts subsisting between the parties, the court made a rule for referring them to the master; and that upon payment of what, if any thing, should be found due to the plaintiff, all further proceedings should be stayed^u. But the court will not stay the proceedings, where the defendant appears to be *insolvent*;
or

^p 7 T. R. 124. but see 1 Bos.

^s 1 Atk. 118. 1 Str. 515.

& Pul. 337.

^t 2 Str. 814. 957. 2 Blac.

^q Cas. temp. Hardw. 116.

Rep. 706. Barnes, 288.

^l Str. 696. *contra*.

^u *Wilkinson and Jordan*, H

^r 1 Str. 696.

23 Geo. III.

or the bond is conditioned for the payment of a gross sum of money absolutely, at a day certain, and afterwards defeazanced, in consequence of a subsequent agreement, to pay the money by instalments^v; or where, though the bond be conditioned for the payment of money by instalments, it is expressly agreed, that if default be made in any one payment, the bond is to stand in force, for the whole principal and interest then remaining due^w. And if an instalment of an annuity secured by bond, be not paid on the day, the bond is forfeited, and the penalty is the debt in law: Therefore, where the defendant had been charged in execution for the penalty of 1000*l.* under such circumstances, previous to the insolvent act of 34 Geo. III. c. 69. the court refused to order that sum to be reduced in the marshal's book, to the sum actually due for the arrears of the annuity, in order that he might take the benefit of that act^x.

Before the statute 4 Geo. II. c. 28. it was usual for the court to stay the proceedings in *ejectment*, on a clause of re-entry for non-payment of rent, at any time before execution executed, on the tenant's bringing into court all the rent in arrear and costs^y: And now, by that statute^z, "if the tenant or his assigns shall. at any time before the
" trial,

^v 3 Bur. 1570.^w 2 Blac. Rep. 958^x 6 T. R. 599^y 2 Salk. 597. 10 Mod.

883. 8 Mod. 345.

^z See the stat. § 4.

“ trial, pay or tender to the landlord, his executors,
 “ &c. or pay into court, all the rent and arrears,
 “ together with the costs, all further proceedings
 “ on the said ejectment shall cease and be discon-
 “ tinued.” Since the making of which statute, it
 has been holden, as before, that after judgment
 against the casual ejector, and before any writ of
 possession executed, the court will stay the pro-
 ceedings, on payment of all the rent and costs ^a.

So in *ejectment* by a mortgagee, for the recovery
 of the possession of the mortgaged premises, or
 in debt on bond conditioned for the payment of
 the mortgage money, or performance of covenants
 in the mortgage deed, where no suit in equity
 is depending for a foreclosure or redemption, it is
 enacted by the statute 7 Geo. II. c. 20. § 1. “ that
 “ if the person having a right to redeem shall, at
 “ any time pending the action, pay to the mort-
 “ gagee, or in case of his refusal, bring into court,
 “ all the principal monies and interest due on the
 “ mortgage, and also costs to be computed by the
 “ court, or proper officer appointed for that pur-
 “ pose, the same shall be deemed and taken to be
 “ in full satisfaction and discharge of the mort-
 “ gage; and the court shall discharge the mort-
 “ gagor of and from the same accordingly ^b.”

Upon

^a 10 Mod. 345. 8 Mod. ^b See 1 Str. 413.

335. 2 Str. 900.

Upon this statute, the proceedings in ejectment on a mortgage may be stayed by the mortgagor, or his assignee of the equity of redemption, on payment of the principal, interest and costs, without paying off a bond debt due to the mortgagee^c. And if there be any doubt, as to the amount of what is due, the court will refer it to the master^d, who taxes the costs; and if the debt and costs are not paid, the plaintiff must proceed in the action, and cannot have an attachment^e. But the court will not stay the proceedings in an ejectment brought by a mortgagee against a mortgagor, on payment of the principal, interest and costs, if the latter has agreed to convey the equity of redemption to the mortgagee^f. And the proceedings cannot be stayed without consent, upon this statute, after a writ of possession has been executed^g.

In actions for *general* damages, it is a rule that the proceedings cannot be stayed, on making satisfaction to the plaintiff: And accordingly, in an action against the sheriff for a false return to a *fieri facias*, the court will not stay the proceedings, on payment of the money levied^h. But there are some exceptions to this rule. In *reple-*
vin

^c 2 Str. 1107. Andr. 341.
S. C.

^d 8 T. R. 326.

^e 2 Str. 1220.

^f 7 T. R. 185. but see 1
Wils. 80. *semb. contra.*

^g *Per Cur.* T. 41 G. III.

^h 7 T. R. 335.

vin for instance, where the defendant avows for rent, the court will stay the proceedings, on bringing it into court, and payment of costsⁱ: But the proceedings cannot be stayed, where the avowry is for damage-feasant^k; because the court in such case have no rule to guide them, in ascertaining the damages. The court in one case, under certain circumstances, stayed the proceedings in an action of *trespass* for seizing goods, on the defendant's undertaking to restore the goods, or pay the full value of them, with the costs of the action^l. But this seems to be contrary to their usual practice, in actions of that nature; and in a subsequent case, the court of exchequer refused to stay the proceedings in such an action, upon the like terms, where it would not end the suit, and particularly as the value of the goods was not admitted^m.

In *trover* for money, the court will give the defendant leave to bring it into courtⁿ. And where *trover* is brought for a specific chattel, of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, the court will make an order for staying the proceedings, upon delivering it to the

ⁱ 2 Salk. 597. 1 H. Blac. 24.

^l Bos. & Pul. 382.

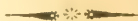
^k 8 Mod. 379.

^l 7 T. R. 53.

^m 3 Anstr. 896.

ⁿ 1 Str. 142.

the plaintiff, and payment of costs^o: And this is the more reasonable, as the action of trover comes in place of the old action of *detinue*. But the court will not stay the proceedings, where there is an uncertainty, either as to the quantity or quality of the thing demanded; or there is any tort that may enhance the damages above the real value, and there is no rule whereby to estimate the additional damages^p. In *trover*, by the assignees of a bankrupt, for a steam-engine, &c. the court made a special rule for staying the proceedings, on delivering to the plaintiffs a part of the goods for which the action was brought, and payment of costs up to that time, provided the plaintiffs would accept thereof in discharge of the action; or otherwise, that the articles delivered should be struck out of the declaration, and the plaintiffs be subject to costs, unless they should obtain a verdict for the remainder of the goods, or prove a deterioration of the part delivered up^q.



The *Security* usually given, by the defendant to the plaintiff, on compromising an action, and which

^o 3 Bur. 1364. Say. Rep. Rep. 120. *contra*.
 80. 2 *Eunom.* 144, 5. Barnes, P 3 Bur. 1364.
 281. Pr. Reg. 260. Cas. Pr. ^q *Brunsdon* and others, as-
 C. B. 130. S. C. but see 2 signees, &c. v. *Austin*, T. 34
 Salk. 597. 2 Str. 822. *Id.* Geo. III. and see 7 T. R. 54.
 1191. 1 Wils. 23. S. C. Say.

which is also frequently given where no action is depending, is a *warrant of attorney*; so called, from its authorising the attorney, or attornies, to whom it is directed, to appear for the defendant, and receive a declaration, in an action to be brought against him; and thereupon to confess the same action, or suffer judgment therein to pass by default^r, &c. And by a late rule^s, every attorney who shall prepare any warrant of attorney to confess judgment, which is to be subject to any defeasance, must cause such defeasance to be written on the same paper or parchment, on which the warrant of attorney is written; or cause a *memorandum* in writing to be made on such warrant of attorney, containing the substance and effect of such defeasance.

Every warrant of attorney should be given voluntarily, and for a good consideration. Therefore if a warrant of attorney be obtained by fraud^t, or for a corrupt and usurious consideration^u, or for securing an annuity which is void by the annuity act^v, the court will order it to be delivered up, and set aside the judgment and proceedings, if any, which have been had under it. So if a warrant of attorney be given by an infant^{*}, or by one of several executors

^r Append. Chap. XXII. § 3.

^t Doug. 196.

^s R. M. 42 Geo. III. 2 East,

^u Cowp. 727.

136. K. B. R. M. 43 Geo. III.

^v *Ante*, 445.

3 Bos. & Pul. 310. C. P.

^{*} 1 H. Blac. 75.

executors to confess a judgment against all ^w, the court will order it to be delivered up, &c. But where a feme-covert who lived by herself, and acted as a feme-sole, gave a warrant of attorney to confess a judgment, and afterwards moved to set aside the judgment, because she was covert, the court would not relieve her, but put her to her writ of error ^x.

Where the defendant is in custody by arrest, it is a rule ^y, that “no bailiff or sheriff’s officer shall
 “presume to exact or take from him, any war-
 “rant to acknowledge a judgment, but in the
 “presence of an attorney for the defendant, who
 “shall subscribe his name thereto; which warrant
 “shall be produced, when the judgment is ac-
 “knowledged; and if any bailiff or sheriff’s offi-
 “cer shall offend therein, he shall be severely pu-
 “nished: And no attorney shall acknowledge or
 “enter, or cause to be acknowledged or entered,
 “any judgment, by colour of any warrant, gotten
 “from any defendant, being under arrest, other-
 “wise than as aforesaid.” Upon this rule it was
 deemed sufficient for the plaintiff’s attorney to be
 present, and subscribe the warrant, as attorney
 for the defendant ^z: And therefore another rule
 was

^w 1 Str. 20.

^y R. E. 15 Car. II. 2.

^x 1 Salk. 400. and see 3
 Bos. & Pul. 128. 220.

^z 2 Str. 1245.

was made ^a, that “no warrant of attorney executed
 “by any person in custody of a sheriff or other of-
 “ficer, for the confession of judgment, shall be va-
 “lid or of any force, unless there be present some
 “attorney on the behalf of such person in custody,
 “to be expressly named by him, and attending
 “at his request, to inform him of the nature and
 “effect of such warrant of attorney, before the same
 “is executed; which attorney shall subscribe his
 “name as a witness to the due execution thereof.”

The object of these rules was not merely to procure the attendance of an attorney, to explain the nature of the instrument to be executed, but also to advise the defendant confidentially and as a friend; and rules thus framed for the protection of a prisoner, cannot be waived by him, when in a situation where he is incapable of exercising his judgment: Therefore, when a defendant in custody executes a warrant of attorney to confess a judgment, there must be an attorney present on his part; the presence of the plaintiff's attorney being insufficient, though the defendant consent to his acting as his attorney also ^b. And the above rules have been construed to extend to warrants of attorney executed abroad ^c.

But

^a R. E. 4 Geo. II. 2 Str. *Per Lawrence, Just.*
 902. Cowp. 281.

^c 2 Str. 1247.

^b 7 T. R. 8. 1 East, 243.

But still it is sufficient, if there be an attorney present, on behalf of the defendant, though he be not an attorney of the same court, in which the judgment is to be entered^d. And the rules only extend to warrants of attorney given by a defendant in custody upon *mesne* process, in a civil action, to a plaintiff at whose suit he is in custody: Therefore where a warrant of attorney is given by a defendant in custody upon process of *execution*^e, or upon criminal process^f, or to a third person, at whose suit the defendant is not in custody^g, an attorney's presence is unnecessary. And where a warrant of attorney was executed in the presence of an attorney's clerk, and it appeared from the defendant's affidavit that he was the more induced to execute it, because he had been informed, that if he did execute it under an arrest, and without his attorney being present, it would be void, the court refused to set aside the proceedings^h.

On the other hand, though the case is not strictly within the rule, yet the court will sometimes interpose and give relief, under particular circumstances; for it is the province of the court to guard against the arts of designing men, practised
upon

^d 1 Str. 530.

^g 5 Mod. 144. 2 Ld. Raym.

^e 2 Str. 1245. Cowp. 281. 797. 3 Bur. 1792. Cowp. 142.

^f T. R. 715. 7 T. R. 19. S. P. 1 East. 241.

^h 4 T. R. 433.

^h Cowp. 142

upon persons under the pressure of distress and imprisonment. Thus if it could be shewn, that a party, even in execution, had been prevailed on to acknowledge a judgment, for more money than was really due, the court would give relief under the circumstancesⁱ; because cases of fraud and imposition are exceptions to all rules whatsoever. And in a late case^k, where interlocutory judgment being signed against a prisoner in custody of the marshal, the plaintiff's attorney took a *cognovit* from him for 200*l.* with a defeasance on paying 49*l.* (the real debt) and costs, but no attorney was present on the part of the defendant; though this case was not strictly within the rule, which only mentions prisoners in custody of sheriff's officers, yet the court interfered for the relief of the prisoner.

By the course of the court, a warrant of attorney given to confess a judgment is not revocable; and if the party giving, endeavour to revoke it, the court will notwithstanding give the other party leave to enter up judgment. But the death of either party is, generally speaking, a countermand of the warrant of attorney^m: And therefore, upon a motion to enter up judgment on an old warrant
of

ⁱ Cowp. 281.

Salk. 87. 7 Mod. 93. S. C.

^k 3 T. R. 616. and see 1 2 Esp. Cas. *M. Pri.* 565.

East, 242. (*a*).

^m Co. Lit. 52. b. 1 Vent.

¹ 2 Ld. Raym. 766. 850. : 310

of attorney, if it appear to the court, that either party is dead, they will not grant the motionⁿ. Yet if either party die in vacation, within a year after giving the warrant of attorney, judgment may be entered up of course, at any time after, in that vacation^o; and it will be a good judgment, at common law, as of the preceding term, though it be not so upon the statute of frauds, in respect of purchasers, but from the signing^p. And even where the party dies after the year, if the court can be prevailed upon to grant a rule for entering up judgment, they will not afterwards set it aside^q. Where there are several parties, and one of them dies before judgment, it may be entered by or against the survivors^r.

When a warrant of attorney is given to a feme-sole, who marries before judgment, the authority is not deemed to be countermanded or revoked; because it is for the husband's advantage^s: And therefore, notwithstanding the marriage, judgment may

ⁿ 2 Str. 718. 1081. 3 T. R. S. C. *Id.* 93. 6 T. R. 368. 7 257. Vin. Abr. tit. *Judgment*, T. R. 21.

W. 7. Barnes, 270.

^o 2 Str. 882. 1081. Vin.

^p T. Raym. 18. 2 Ld. Raym.

Abr. tit. *Judgment*, W. 7.

766. 850. 1 Salk. 87. 7 Mod.

Barnes, 270.

3, 93. S. C. 2 Str. 882. 3 P.

^r 1 Wils. 312. Say. Rep. 5.

Wms. 399. 6 T. R. 368. 7 T.

S. C. Barnes, 40. 53. but see

R. 20. Willes, 427, 8. Barnes,

Barnes, 45. *contra*.

267, 8.

^s 12 Mod. 383. 7 Mod. 53.

^p 1 Salk. 401. 7 Mod. 39.

1 Salk. 117. S. C.

may be entered up, in the names of the husband and wife. But, in order to warrant this entry, there should be a previous application to the court, founded on an affidavit of the marriage ^t. And in one case ^u, it was ruled upon motion, that if a woman give a warrant of attorney, and then marry, the plaintiff may file a bill, and enter judgment, against both husband and wife, by the practice of the court. But in a subsequent case ^v, it is said that if a feme-sole give a warrant to confess a judgment, and marry before it be entered, the warrant is countermanded, and judgment shall not be entered against husband and wife, for that would charge the husband ^w.

In entering up judgment on a warrant of attorney, the authority given by it must be strictly pursued: Therefore if a plaintiff enter up judgment in debt *on a mutuatus*, on a warrant of attorney to enter up judgment in debt *on bond*, the court will set it aside as irregular ^x. So if a warrant of attorney be given, to appear and confess judgment of

^t 3 Bur. 1471.

^u 1 Show. 91. Say. Rep. 6.

3 Bur. 1470. S. C. cited.

^v 1 Salk. 399. 7 Mod. 53.

S. C. cited.

^w *Tamen quære*; for it seems as reasonable that he should be charged in this case, as

for a bond or other debt, which

he is liable for during the coverture, though not after. 1

Salk. 117. cites 1 Roll. Abr.

351. F. 1. G. 2. F. N. B. 120.

F.

^x 8 T. R. 153.

of a particular term, the judgment should be entered accordingly of that term, and cannot be entered of any other^y. But if the warrant of attorney be given, to appear and confess judgment generally, or (as is most usual) of a particular or any subsequent term, judgment may be entered of any term after giving the warrant^z. Where a warrant of attorney was given in vacation, and judgment was entered up thereon as of the preceding term, the court ordered the judgment to be set aside, for the danger that might otherwise ensue to purchasers^a. And where a warrant of attorney was given to confess judgment, at the suit of an executor, as of the preceding term, when the testator was living, and the judgment was entered up accordingly, the court held it to be irregular^b; for the attorney could have no authority to appear in that term, at the suit of the executor, and the judgment must be considered as of that term, though to other purposes the day of signing is material.

Within a year and a day next after the date of the warrant, judgment may be entered of course, without applying to the court or a judge. But if it be not entered within that time, the court must be moved, in term-time^c, or if the warrant of attorney

^y 1 Mod. 1. 7 Mod. 53.

^z *Id. ibid.*

^a 1 Sid. 222. but note, this was before the statute of frauds, by which judgments

affect purchasers, only from the time of signing.

^b 2 Str. 1121.

^c 3 Salk. 322. 7 Mod. 94. 6 Mod. 212. 1 Wils. 36. *arg.*

torney be not above *ten* years old ^d, an application may be made to a judge in vacation, for leave to enter up the judgment, on an affidavit of the due execution of the warrant of attorney, that the debt, or part of it, is still due, and that the parties are living^e. On making the application, the court or judge expect to be informed, when the defendant was alive: If in town, it should appear that he was alive at a *certain* time, within two or three days, or if in the country within a week or ten days ^f, before the application is made; an affidavit that he was alive *on or about* a particular day, being deemed insufficient^g: and if the application be made to the court, it should appear that the defendant was alive during the same term ^h: for then, though he should be since dead, yet the judgment, by relation back to the first day of the term, will appear to have been given in his lifetime.

The

^d *Ante*, 439. (o).

^e Append. Chap. XXII. § 4. But if A. agree to acknowledge an old warrant of attorney given by him, so as to enable B. to enter up judgment thereon, judgment may be entered up under a judge's order, in the common pleas, without an affidavit of the subscribing witness. 2 Bos. & Pul. 85.

^f See Willes, 66. Barnes,

256. Cas. Pr. C. B. 143. S. C.

where judgment was entered up on a warrant of attorney, against a defendant in *Jamaica*, on an affidavit that he was alive four months before.

^g *Per Cur.* H. 41 G. III.

^h But an affidavit that he was alive *on or after* the *essoin*-day of the term is sufficient. *Per Cur.* M. 43 G. III.

The judgment upon a warrant of attorney, being in *debt*, is always final; and signed in like manner as a final judgment by confession or default in an adverse suit, which will be treated of in the next chapter. And by a late rule of courtⁱ, no judgment can be signed upon any warrant, authorising an attorney to confess judgment, without such warrant being delivered to, and filed by the clerk of the dockets; who is ordered to file the warrants, in the order in which they are received.



In order to *compound* a penal action, an application must be made to the court wherein it is depending, founded upon the statute 18 Eliz. c. 5. § 3.^k by which it is enacted, that “no common
“informer or plaintiff shall or may compound or
“agree with any person or persons that shall
“offend, or that shall be surmised to offend,
“against any penal statute, for an offence committed, or pretended to be committed, but
“after answer made in court, to the information
“or suit in that behalf exhibited or prosecuted;
“nor after answer, but by the order or consent
“of the court, in which the same information or
“suit

ⁱ R. M. 42 G. III. 2 East,
136.

^k Made perpetual by the 2^d
Eliz. c. 10.

“ suit shall be depending; upon the pains and penalties therein set down and declared.” But this statute extends only to *common* informers, and not where the penalty is given to the party *grieved*¹.

The application for leave to compound is made by consent, upon an affidavit, setting forth the nature of the action, the state of the cause, the agreement of the parties, and that no more than a certain sum is given or taken^m, &c. which application should regularly be made in an early stage of the cause; but under favourable circumstances, it may be made after verdictⁿ: And in one case, where the defendant was in execution, the court, on an affidavit of his poverty, gave the plaintiff leave to compound with him^o. Upon the application being made, it is in the discretion of the court to give or withhold their leave to compound^p; and it was refused by the court in a late case, where an action was brought on the statute 25 Geo. II. c. 36. for keeping a disorderly house^q. Where leave is given to compound a penal action, it is a general rule, that the king's half of the composition shall be paid into the hands of the master of the crown-office,
for

¹ 1 Salk. 30. and see the statute, § 6. 2 Hawk. P. C. 279.

^o 1 Str. 167.

^p 1 Wils. 79. 130.

^q *Bellis v. Beale*, M. 38 G.

^m Append. Chap. XXII. § 5. III. and see 2 Blac. Rep.

ⁿ 5 T. R. 98. 1 Bos. & Pul. 18. 1157.

for the use of his majesty^r; which is now usually done before the rule is drawn up. And where a defendant in a penal action obtained a rule to stay proceedings, on paying a sum agreed upon between him and the plaintiff, the court considered it as an undertaking by him to pay that sum; and for the non-payment of it, granted an attachment^s: But for preventing any doubt in future, an order was made, that every rule to be drawn up for compounding any *qui tam* action, do express, that the defendant doth undertake to pay the sum, for which the court has given him leave to compound such action^t.

^r 4 Bur. 1929. and see § 5 T. R. 257.
^s 2 Blac. Rep. 1154 § R. F. 33 Geo: III

CHAPTER XXIII.

Of JUDGMENT by CONFESSION, and DEFAULT.

WHEN the defendant, having no merits, cannot compromise or compound the action, it is usual for him to confess it, or let judgment go by default.

The objects proposed by confessing an action are two-fold; first, in an action for damages, to save the expence of executing a writ of inquiry, and secondly, to obtain terms, such as a stay of execution, &c. And the confession^a, or as it is usually called, from the entry of it, a *cognovit actionem*, is either before or after plea pleaded; in the latter case, the plea being withdrawn, it is called a confession, or *cognovit actionem, relictâ verificatione*^b.

In general, the confession is made after declaration, and before plea; and written on the declaration or back of the inquiry, or on plain paper^c, thus:
 “ I confess this action, or, (if in *debt*,) the debt in
 “ this

^a Append. Chap. XXIII. § 1, 2. any terms of agreement between the parties. *Per Cur.*

^b *Id.* § 3. M. 42 Geo. III. K. B. 2 Bos.

^c A mere *cognovit* need not & Pul. 150. C. P.
 be stamped unless it contain

“ this cause, and that the plaintiff hath sustained
 “ damages to such an amount, besides his costs
 “ and charges, to be taxed by the master:” then
 follow the terms, if any are agreed on, as that “ no
 “ judgment shall be entered up, or execution is-
 “ sue, until default shall be made in payment of
 “ the debt or damages and costs, by a certain day,
 “ and that no writ of error shall be brought, or bill
 “ in equity filed; but that in case default shall be
 “ made, the plaintiff shall be at liberty to enter up
 “ judgment, and take out execution, for the debt
 “ or damages and costs, together with sheriff’s
 “ poundage, and all other incidental expences^d.”
 Where the confession is after plea pleaded, the de-
 fendant’s attorney ought to come in person before
 the master, to withdraw it^e.

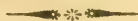
Again, the confession is either of the *whole*, or
part of the cause of action. If it be of the whole,
 and not upon terms, the plaintiff’s attorney may
 immediately sign final judgment^f, and take out
 execution thereon; but if it be not of the whole,
 he can only sign judgment for the part confessed,
 and the action must proceed for the residue.
 Where a judgment is confessed upon terms, it be-
 ing in effect but a conditional judgment, the court
 will

^d Append. Chap. XXIII.
 § 1.

^f Append. Chap. XXXIX.
 § 17, &c.

^e 1 Ld. Raym. 345.

will take notice of it, and see the terms performed : but where the judgment is acknowledged absolutely, and a subsequent agreement made, this does not affect the judgment, and the court will take no notice of it, but put the party to his action on the agreement ^g. And it has been said ^h, that the court cannot hold plea of an agreement upon motion: But it is usual in practice, to set aside a judgment entered up, and execution taken out, contrary to the agreement of the parties, at the time of confessing the judgment ⁱ.



Judgment by *default*, which is an implied confession of the action, is either by *nil dicit* ^k, where the defendant appears, but says nothing in bar or preclusion of the action; or by *non sum informatus* ^l, where his attorney says, he is not informed of any answer to be given thereto. Judgment by *nil dicit* is either for want of any plea at all; or for want of a plea adapted to the nature of the action, or circumstances of the case; or for not pleading in due time; or proper manner.

On the expiration of the time for pleading, a rule to plead having been given, and a plea demanded,

^g 1 Salk. 400.

^k Append. Chap. XXXIX

^h *Id. ibid.*

§ 1, &c.

ⁱ 6 Mod. 14. and see 2 Blac.

^l *Id.* § 15, 16

Rep. 943.

manded, when necessary, the plaintiff's attorney should *search* for a plea, if not delivered to him, with the clerk of the papers, who receives special pleas, and with the clerk of the judgments, who keeps the general-issue book, at the king's bench office; and if no plea be delivered, or found at either of those offices, the plaintiff's attorney may sign judgment, as for want of a plea. And judgment may be signed in like manner, if the defendant do not rejoin^m, plead to a new assignment, or join in demurrer, when necessary; or do not return the paper or demurrer-book in due time.

When the defendant pleads a plea not adapted to the nature of the action, as *nil debet* in *assumpsit*ⁿ, &c. the plaintiff may consider it as a nullity, and sign judgment. So if the defendant, after craving over of a deed, do not set forth the whole of it, the plaintiff may sign judgment, as for want of a plea^o. But the plea of not guilty, in an action of *debt* on a penal statute, is not such a nullity, as will warrant the plaintiff in signing judgment^p. If the defendant, when under an order to plead issuably, put in a plea which, though informal, goes to the substance of the action, the plaintiff cannot

^m 5 T. R. 152.

^o 4 T. R. 370. *Slater v.*

ⁿ Barnes, 257. and see 2 Str. 1022. and the cases there cited, as to the validity of a plea of *not guilty* in *assumpsit*.

Horne, E. 54 G. III. S. P.

^p 1 T. R. 462. and see 3 Bos. & Pul. 111. 174.

cannot sign judgment as for want of a plea ^q: And in general, where the defendant pleads an improper plea, the safest course is not to sign judgment, but to demur, or move the court to set it aside ^r.

If the defendant plead a judgment recovered, or other plea that is not issuable, after a judge's order for time to plead, on the terms of pleading issuably, the plaintiff may sign judgment, as for want of an *issuable* plea ^s. And he may also sign judgment, where the defendant pleads in abatement, without an affidavit of the truth of the plea, or after the expiration of four days inclusive from the delivery, or filing and notice of declaration ^t; or if he plead a tender, without paying the money into court ^u: or where a plea of *solvit ad diem*, which ought to be delivered to the plaintiff's attorney, is entered in the general-issue book ^v.

The plaintiff may *waive* a judgment by default ^w; or if *irregular*, the defendant may move the court to set it aside: But the motion for this purpose must be made in term-time, or notice given of it in vacation, two days at least before the day appointed for executing the inquiry. And even though the judgment be *regular*, yet where the
 plaintiff

^q 5 T. R. 152.

^r *Ante*, 430.

^s 1 Bur. 59. and see 1 East, 411. and the cases there cited.

^t 1 T. R. 277. 689.

^u 1 Str. 638.

^v 5 T. R. 661.

^w T. 23 Car. I. K. B.

plaintiff has not lost a trial, the court on motion will set it aside, upon an affidavit of merits, (which may in general be made by the attorney ^x;) pleading issuably *instanter* ^y, and payment of costs ^z: And the court will do this in *ejectment*, as well as in other actions ^a. But they will not set aside a *regular* judgment, to give the defendant advantage of a nicety in pleading ^b; or to let him in to plead the statute of limitations ^c, nor an *irregular* judgment, after the defendant has given a *cognovit* ^d.

A judgment by default is *interlocutory* or *final*. Where the action founds in damages, as *assumpsit*, *covenant*, *trover*, *trespass*, &c. the judgment is only interlocutory, that the plaintiff ought to recover his damages, leaving the amount of them to be afterwards ascertained: And the judgment for the plaintiff in these actions is also interlocutory, on demurrer or *nul tiel record*. In *debt*, the judgment is commonly said to be *final*: but where an action is brought on a judgment, the plaintiff may have a writ of inquiry, after judgment by default, to recover interest by way of damages, for the detention of the debt ^e. And by the statute 8 & 9 W. III.

c. 11.

^x *Per Cur.* H. 37 Geo. III.

^b 2 Str. 1242.

^y *Instanter* means within twenty-four hours. *Pryce v. Hodgson*, E. 35 Geo. III.

^c 1 Blac. Rep. 35. But see 1 Bos. & Pul. 52. 228. *Ante*, 428.

^z 1 Salk. 402. 2 Salk. 518. 2 Str. 823. 1 Bur. 568.

^d 7 T. R. 206. *Ante*, 214, 15.

^e 7 T. R. 446. and see 8 T.

^a 2 Str. 975. 4 Bur. 1996. R. 395. 1 East, 436.

c. 11. § 8. it is enacted, that “ in all actions upon
 “ any bond or bonds, or on any penal sum, for
 “ non-performance of any covenants or agreements,
 “ in any indenture, deed, or writing contained, if
 “ judgment shall be given for the plaintiff on a de-
 “ murrer, or by confession or *nihil dicit*, the plain-
 “ tiff upon the roll may suggest as many breaches
 “ of the covenants and agreements as he shall think
 “ fit; upon which shall issue a writ to the sheriff
 “ of that county where the action shall be brought,
 “ to summon a jury to appear before the justices
 “ or justice of assize or *nisi prius*, of that county,
 “ to inquire of the truth of every one of those
 “ breaches, and to assess the damages that the
 “ plaintiff shall have sustained thereby; in which
 “ writ it shall be commanded to the said justices
 “ or justice of assize or *nisi prius*, that he or they
 “ shall make return thereof, to the court from
 “ whence the same shall issue, at the time in such
 “ writ mentioned : and in case the defendant or
 “ defendants, after *such judgment*^f entered, and
 “ before any execution executed, shall pay into
 “ the court where the action shall be brought, to
 “ the use of the plaintiff or plaintiffs, or his or their
 “ executors or administrators, such damages so to
 “ be assessed, by reason of all or any of the breaches
 “ of

^f The judgment here spoken of, by reference to a former part of the statute, seems to be the common-law judgment for the penalty.

“ of such covenants, together with the costs of suit,
“ a stay of execution of the said judgment shall be
“ entered upon record; or if by reason of any exe-
“ cution executed, the plaintiff or plaintiffs, or his
“ or their executors or administrators, shall be fully
“ paid or satisfied all such damages so to be as-
“ sessed, together with his or their costs of suit, and
“ all reasonable charges and expences for execu-
“ ting the said execution, the body lands or goods
“ of the defendant shall be thereupon forthwith
“ discharged from the said execution, which shall
“ likewise be entered upon record: But notwith-
“ standing, in each case, such judgment shall re-
“ main, continue and be as a further security to an-
“ swer to the plaintiff or plaintiffs, and his or their
“ executors or administrators, such damages as
“ shall or may be sustained, for further breach of
“ any covenant or covenants in the same inden-
“ ture, deed, or writing contained.”

This statute was made in favour of defendants; and is highly remedial, being calculated to protect them against the payment of more money than is justly due, and to take away the necessity of proceedings in equity, to obtain relief against an unconscientious demand of the whole penalty, in cases where small damages only have accrued^s: And accordingly, it has received a very liberal construction.

tion. Where covenants and agreements are contained in the condition of a bond, they are held to be within the statute, as well as where they are in a different instrument^h; and though it was formerly doubtedⁱ, yet it is now settled, that the statute is *compulsory* on the plaintiff, to proceed in the method it prescribes^k. A bond conditioned for the payment of an *annuity* is holden to be within the statute^l. And in cases where it applies, a suggestion of breaches is necessary, after a plea of *non est factum*^m; which suggestion may be entered at any time before trial: but where the general issue alone has been previously delivered, it is irregular to deliver a second issue with a suggestion, without a summons and judge's orderⁿ. But the provisions of the statute do not extend to bonds conditioned for the payment of money, which are provided for by the statute 4 Ann. c. 16.; nor to *bail-bonds*^o; nor as it seems to bonds given to the lord chancellor, by the petitioning creditor for a commission of bankrupt, under the statute 5 Geo. II. c. 30. § 23. * Where judgment is given for the plaintiff, on an issue of *nul tiel record*, or entered up on a warrant of attorney, it does not seem to be within the statute.

In

^h 2 Bur. 772. 820. 2 Blac. Rep. 843. Doug. 519.

ⁱ Com. Rep. 376.

^k 2 Wils. 377. Say. Dam. 67. S. C. Cowp. 357. *Per Cur.* H. 41 Geo. III.

^l 2 Bur. 820. 5 T. R. 538. P.

636. 8 T. R. 126.

^m 1 Esp. Cas. *Ni. Pri.* 277.

8 T. R. 255.

ⁿ 8 T. R. 255.

^o *Selby* and others, assignees &c. v. *Serres*, E. 41 Geo. III. K. B. 2 Bos. & Pul. 446. C.

* 7 T. R. 300. 3 East, 22

In cases where the statute applies, judgment is signed for the penalty, as at common law ^p; but it can only stand as a security for the damages sustained: And after signing judgment, the plaintiff must proceed on the statute, by suggesting breaches on the roll ^q; of which it is usual to give a copy to the defendant, with notice of inquiry for the sittings or assizes. A writ of inquiry is then sued out^r, and delivered to the sheriff, who summons the jury, and returns the jury-process, with a panel of the names of the jurors: a copy of the record is then made, including the suggestion, on double-six-penny stamped paper or parchment, for the chief-justice or judge of assize; and the writ being executed, is returned to the court, with the finding of the jury, and execution is awarded for the damages and costs. On the execution of a writ of inquiry on this statute, after judgment on demurrer, the execution of an instrument which the defendant had stated, in setting out the condition of the bond in his plea, need not be proved ^s.

An *interlocutory* judgment is signed on treble-penny stamped paper, with the clerk of the judgments, in the king's-bench office; an *incipitur* being first entered on a roll, of the same term with the

^p 2 Bur. 825. Cowp. 357. ^s 1 Esp. Cas. *Ni. Pri.* 156.

^q Append. Chap. XXXIX. and for a full account of the
§ 12. proceedings under this statute,

^r Append. Chap. XXIII. see 1 Saund. 58. *in notis*

§ 9, 10

the declaration: *Final* judgment is signed on a double half-crown stamped paper; and no rule for judgment being necessary, the plaintiff may immediately proceed to tax his costs, and take out execution.

After an interlocutory judgment, a writ of inquiry of damages is in general awarded; which is a judicial writ, directed to the sheriff of the county where the action is laid[†]; setting forth the proceedings which have been had in the cause; “and
“ that the plaintiff ought to recover his damages,
“ by occasion of the premises: But because it is
“ unknown what damages he hath sustained by
“ occasion thereof, the sheriff is commanded, that
“ by the oath of twelve honest and lawful men of
“ his county, he diligently inquire the same; and
“ return the inquisition into court^u.”

In an action on the case upon two promises, there was judgment by default as to the first promise, and as to the second a *nolle prosequi*: A writ of inquiry was taken out, to inquire what damages the plaintiff had sustained, *by occasion of the premises*; and upon the return of this, it was moved to amend the writ, and make it, *by occasion of the not performing of the first promise*: And upon the authority of *Baker against Campbell*^v, the writ was amended

[†] 2 Lil. P. R. 721.

§ 4, &c.

^u Append. Chap. XXIII.

^v E. 4 Ann. B. R.

amended in this case ; the record of the judgment by default being a warrant to amend by ^w.

The writ of inquiry should be returnable on a general return, or day certain, according to the nature of the proceedings : if by *original*, on a general return ; if by *bill*, on a day certain. But where, in an action by bill against an attorney, the writ of inquiry was returnable on a general return, it was holden not to be error ; but only a mis-continuance, and cured by the statutes of jeofails ^x.

A writ of inquiry of damages is a mere inquest of office, to inform the conscience of the court ; who, if they please, may themselves assess the damages ^y : And it is accordingly the practice, in actions upon promissory notes and bills of exchange, instead of executing a writ of inquiry, to apply to the court, for a rule to shew cause, why it should not be referred to the master, to see what is due for principal and interest, and why final judgment should not be signed for that sum, without executing a writ of inquiry ; which rule is made absolute, on an affidavit of service, unless
good

^w 1 Str. 684. and see Cas. *comp.* Hardw. 314.

^x 2 Str. 947. Say. Rep. 245.

^y See 1 H. Blac. 542. and the several cases there cited. And in confirmation of this doctrine,

it may be observed, that the courts have the power of setting aside inquisitions for small or excessive damages ; and in some cases, of increasing them. Say. *Dam.* 173, &c.

good cause be shewn to the contrary ^z. And a similar rule may be obtained in actions on covenants, for the payment of a sum certain ^a; or on an award ^b. But the court refused to refer it to the master, to ascertain the damages sustained by the plaintiff, in an action of *debt* on a judgment recovered on a bill of exchange ^c.

The practice we are now speaking of is confined to cases, where it appears on the declaration, that the action is brought upon promissory notes or bills of exchange, &c. ^d; for in these cases, the *quantum* of damages depends on figures, and may be as well ascertained by the master, as before a jury: And therefore where the defendant had suffered judgment by default, in an action of *assumpsit* on a foreign judgment, the court refused to make the rule absolute, for a reference to the master; saying, this was an attempt to carry the rule further than had yet been done, and as there was no instance of the kind, they would not make a precedent for it ^e. In a subsequent case ^f, the court refused to make the rule absolute, in an action upon a bill of exchange, for *foreign* money; the value of which is uncertain, and can only be ascertained

^z 4 T. R. 275. and see *Cur.*

1 H. Blac. 252. 529. 541. ^c 8 T. R. 395.

2 Bos. & Pul. 55. ^d *Id.* 648.

^a Doug. 316. 8 T. R. 326. ^e 4 T. R. 493.

410. ^f 5 T. R. 87.

^b *Meggison* and ———, *per*

certained by a jury ^g. And such a rule cannot be had in *assumpsit* for a sum certain, due upon an agreement ^h; or in an action upon a bottomree bond ⁱ. But where there was a demurrer to one count on a bill of exchange, and judgment for the plaintiff, and a plea to other counts on which issue was joined, the court referred it to the master, to see what was due to the plaintiff on the former ^k.

Where the jury, upon the trial of an issue, omit to assess the damages, the omission may in some cases be supplied by a writ of inquiry ^l: As to which it seems, that where the matter omitted to be inquired by the principal jury, is such as goes to the very point of the issue, and upon which, if it be found by the jury, an attain will lie against them by the party, if they have given a false verdict; there such matter cannot be supplied by a writ of inquiry, because thereby the party may lose his action of attain, which will not lie upon an inquest of office ^m.

Thus in *detinue*, where the jury omitted to assess the value of the goods, the court refused to supply the omission by a writ of inquiry ⁿ. And

so

^g Cro. Eliz. 536. Cro. Jac. 617.

^h *Per Cur.* H. 37 Geo. III.

ⁱ *Palin v. Nicholson*, E. 38 Geo. III.

^k 7 T. R. 473.

^l *Cheyney's case*, 10 Co. 118.

^m Carth. 362. 2 Str. 1052.

ⁿ 1 Sid. 246. T. Raym. 124.

1 Keb. 882.

so where the jury who try the issue in *replevin* upon a distress for rent, omit to inquire of the rent in arrear, and value of the goods or cattle distrained, pursuant to the statute 17 *Car.* II. c. 7. no writ of inquiry can be afterwards awarded, to supply the omission^o; for by the words of the statute, these matters are to be inquired of by the *same* jury who try the issue^p.

But where the matter omitted to be inquired by the principal jury, doth not go to the point in issue, or necessary consequence thereof, but is merely collateral, as the four usual inquiries on a *quare impedit*^q, there such matter may be supplied by a writ of inquiry, without any damage to the party; because if the same had been inquired of by the principal jury, it would have been, as to those particulars, no more than an inquest of office, upon which an attaint will not lie^r.

So, where the parties being at issue in *assumpsit*, a demurrer was joined upon the evidence, and the jury discharged, without assessing the damages; and afterwards judgment was given for the plaintiff, and a writ of inquiry of damages awarded; the court held, that though the same jury might have assessed the damages conditionally, yet it may be
as

^o 1 Sid. 380. T. Raym. 170. 1 Vent. 40. 2 Keb. 408. 1 Lev. 255. 2 Str. 1052. Gilb. Dist. 165

^p 1 Salk. 205, 6. Cas. temp. Hardw. 141. 295.

^q *Cheyney's case*, 10 Co. 118.

^r Carth. 362.

as well done by a writ of inquiry of damages, when the demurrer is determined; and the most usual course is, when there is a demurrer upon evidence, to discharge the jury, without further inquiry^s.

So in *trespass* or *replevin*, against *overseers* of the poor, acting *virtute officii*, if the plaintiff be nonsuit^t, or have a verdict against him^u, and the jury are discharged, without inquiring of the treble damages, pursuant to the statute 43 Eliz. c. 2. § 19. the defect may be supplied by a writ of inquiry; because such inquiry is no more than an inquest of office. In such case, as a ground for awarding a writ of inquiry, it is necessary to enter a suggestion upon the roll, that the defendants were overseers of the poor; and that the action was brought against them, for something done by virtue of their office^v.

The writ of inquiry may be executed, on due notice, before the sheriff or his deputy^w; or by leave of the court, under special circumstances, before the chief-justice^x or a judge of assize, as an assistant to the sheriff^y: And where the writ of inquiry

^s Cro. Car. 143.

214. 3 Wils. 442.

^t 1 Rol. Rep. 272. 2 Rol. Rep. 112. 5 Mod. 76, 7. 118. Carth. 362. 1 Salk. 205. Skin. 595. Comb. 344. S. C.

^v Cas. temp. Hardw. 138. Say. Rep. 214.

^w 2 Wils. 379.

^x 12 Mod. 519. 1 Str. 612.

^u Cas. temp. Hardw. 133. 2 Str. 1021. S. C. Say. Rep.

2 Str. 853. Barnes, 233

^y 12 Mod. 610.

inquiry is executed before the chief-justice or a judge of assize, it is usual to move the court, for the sheriff to return a good jury. But unless some matter of law is likely to arise in the course of the inquiry, the court will not give leave to have it executed before a judge, merely on account of the importance of the facts ^z.

The notice of inquiry should be in writing ^a; and if the defendant have appeared, and his attorney be known, it should be delivered to such attorney ^b: or if an agent be employed in country causes, the notice should be delivered to the agent in town, who issues the *subpœnas*, and not to the attorney in the country: * But if the defendant have not appeared, or his attorney be unknown, the notice should be delivered to the defendant himself, or left at his last place of abode ^c. If the venue be laid in *London* or *Middlesex*, and the defendant live within forty *computed* ^d miles from *London*, there must be in general *eight* days notice of inquiry, exclusive of the day it is given ^e; which notice is also sufficient in country causes: For the statute 14 Geo. II. c. 17. § 4. which requires *ten* days notice of trial at the assizes, does not extend to notices of inquiry. But where the venue is laid in *London* or *Middlesex*, and the defendant lives above forty computed miles from

^z *Boddington v. Boddington*,
E. 37 Geo. III. but see 2 Sel.
12.

^a R. M. 4 Ann. (c).

^b Say. Rep. 133.

^c *Id.* 133.

^d 2 Str. 954. 1215.

^e Sty. P. R. tit. *Notice*, 421.

6 Mod. 146. R. M. 4 Ann. (c).

8 Mod. 21.

* 3 East, 568

from *London*, there must be *fourteen* days notice of inquiry : And *Sunday* is to be accounted a day in these notices, unless it be the day on which the notice is given^f. Where the plaintiff, upon any pleading of the defendant, tenders an issue, and the paper-book is made up, and delivered with notice of trial, and the defendant strikes out the *similiter*, and returns the book with a demurrer, if judgment be given thereon for the plaintiff, the defendant's attorney shall be obliged to accept of notice of executing the writ of inquiry, from the time of giving the notice of trial^g. *Short* notice of inquiry is the same as short notice of trial : And where a term's notice of trial is required, there must, at the same distance of time, be the like notice of inquiry^h.

Where the inquiry is to be executed before the chief-justice or a judge of assize, the notice should be given for the sittings or assizes generally ; but otherwise the notice should express the particular time and place of executing itⁱ. A writ of inquiry may be executed at any time before, or on the

^f R. M. 4 Ann. (c). 8 Mod. 21.

^g R. H. 8 G. I.

^h 2 Str. 1100. Append. Chap. XXIII. § 11.

ⁱ Say. Rep. 181. and see Append. Chap. XXIII. § 12, 13, 14. In the common pleas, notice was given of executing

a writ of inquiry, "on *Tuesday* the 14th day of January instant," when the 14th of January fell on a *Thursday*; and the court refused to set aside the execution of the writ of inquiry on that ground, rejecting the word *Tuesday* as surplusage. 3 Bos. & Pul. 1.

the day it is returnable^k; but not on a *Sunday*^l: and where the notice was to excuse it *by* ten o'clock, the court set it aside for uncertainty^m. The usual way is to give notice, that the inquiry will be executed *between* two certain hoursⁿ; as between ten and twelve o'clock in the forenoon, or between four and six in the afternoon, of a particular day, on or before the return of the writ. On a notice of inquiry so given, the party is not tied down to the precise time fixed by the notice; for the sheriff may have prior business, which may last beyond it: Therefore where notice was given of executing an inquiry, between ten and twelve o'clock, and the irregularity complained of was, that the defendant and his witnesses attended till twelve, and after the hour was elapsed, and they were gone, the writ was executed; the court refused to set aside the inquisition, conceiving it was clearly a trick of the defendant's attorney, to leave the place immediately after the hour was passed^o.

With regard to the *place* of executing an inquiry, it must be executed within the county where the action is laid. In *Middlesex*, inquiries are usually executed in the morning during term-time, at the King's Arms Tavern, *Palace Yard*, *Westminster*:

^k 2 Ld. Raym. 1449.

ⁿ Say. Rep. 181

^l 1 Str. 387.

^o Doug. 198.

^m 2 Str. 1142.

Westminster: and in the afternoon during term-time, as well as in vacation, at the sheriff's office in *Took's-court*, *Cursitor-street*, *Chancery-lane*. In *London*, they are executed in term-time, as well as vacation, at the Secondary's office, *Lothbury*: And the notices should be given accordingly. Notice of inquiry may be *continued*^p or *countermanded*^q, in like manner as notice of trial.

In *London* and *Middlesex*, the writ must be left at the sheriff's office, the day before the time appointed for its execution^r: And if either party propose to attend by counsel, he should give notice thereof to his adversary^s, or he will not be allowed for it in costs. Previous to the execution of the inquiry, witnesses may be *subpœna'd* on either side^t. And the execution of it may be *adjourned* by the sheriff, after it is entered upon^u. And if the plaintiff do not proceed to execute the inquiry according to notice, or countermand in time, the defendant.

ON

^p Append. Chap. XXIII. § 16.

15. In the common pleas, if notice of a writ of inquiry, to be executed at a particular hour and place, be continued, the notice of continuance need not express any hour or place.

¹ Bos. & Pul. 363.

^q Append. Chap. XXIII.

§ 16.

^r R. H. 25 G. III.

^s Append. Chap. XXIII § 17.

^t For the process of *subpœna* on a writ of inquiry, and the *subpœna*-ticket, see Append. Chap. XXIII. § 18, 19, 20

^u 2 Str. 853. 1259.

on an affidavit of attendance and necessary expences, shall have his costs, to be taxed by the master ^v.

Letting judgment go by default is an admission of the cause of action: And therefore, where the action is founded on a contract, the defendant cannot give in evidence that it was fraudulent ^w. So in an action on a promissory note or bill of exchange, the note or bill need not be proved, though it must be produced before the jury, in order to see whether any money appears to have been paid upon it ^x. And where an action was brought on a policy of assurance, on a foreign ship, wherein there was a stipulation, that the policy should be deemed sufficient proof of interest; the plaintiff, on the writ of inquiry, was only bound to prove the defendant's subscription to the policy, without giving any evidence of interest ^y.

On the return-day of the inquiry, the plaintiff should give a rule for judgment ^z, with the clerk of the rules, which expires in four days ^a. And on the expiration of such rule ^b, the sheriff being called upon for his return, will deliver it, with the inquisition,

^v 1 Str. 317. 2 Str. 728. R. H. 8 G. I. (a).

^y Doug. 315.

^w 1 Str. 612.

^z Append. Chap. XXIII.

^x 2 Str. 1149. Barnes, 233,

§ 21.

4. 3 Wils. 155. Doug. 316. 3

^a 1 Salk. 399.

T. R. 301. 1 H. Blac. 543.

^b *Id. ibid.*

sition^c, to the plaintiff's attorney; who gets the inquisition stamped, with a double half-crown stamp, and taxes his costs thereon with the master. Pending the rule for judgment, the defendant may move to set aside the inquisition, for want of due notice^d; or on account of an objection to the jury, or mode of returning them, as that some of the jury were debtors taken out of prison for the purpose of attending^e, or that they were returned by the plaintiff's attorney^f; or for excessive damages^g. And where the damages are obviously too small, and there has been any contrivance by the defendant^h, or surprise on the plaintiffⁱ, or the sheriff or jury have been mistaken in point of law^k, but not otherwise^l, the plaintiff may, at any time before final judgment signed^m, move to set aside the inquisition.

If two defendants in *trespass* suffer judgment by default, and the plaintiff execute writs of inquiry, and take several damages against them separately, it is irregular; and if the plaintiff enter up final judgment

^c Append. Chap. XXIII.

^d § 22, &c.

^e d Sty. P. R. 421.

^f 4 T. R. 473. but see 2 Str. 1159.

^g Cowp. 112.

^h 2 Leon. 214. 3 Leon. 117. S. C. 3 Bur. 1846. 3 Wils. 53.

ⁱ 2 Salk. 647.

^j 1 Str. 515. 2 Str. 1259.

^k 2 Salk. 647. 1 Str. 425.

^l 8 Mod. 196. 2 Str. 1259. 6 T. R. 608.

^m 2 Leon. 21. 3 Leon. 117.

S. C. 2 Str. 940. 2 Barnard.

K. B. 177. S. C. Doug. 509.

2 T. R. 261.

ⁿ *McCulloch v. Willocks*, M

37 G. III.

ment for those several damages against the defendants, it is erroneous: But the court will permit the plaintiff to set aside his own proceedings before final judgment, on payment of costs ⁿ. And if the plaintiff, on the execution of the writ of inquiry, give no evidence on one or more of the counts in his declaration, he may afterwards sue for the causes of action contained in those counts: Thus, where the plaintiff in a former action declared on a promissory note, and for goods sold, but upon executing a writ of inquiry, after judgment by default, gave no evidence on the count for goods sold, and took his damages for the amount of the promissory note only; the court ruled, that the judgment thereupon was no bar to his recovering in a subsequent action for the goods sold ^o.

The want of a writ of inquiry is aided by the statute of Jeofails ^p. And where a writ of inquiry had been many years executed, and costs taxed upon it, but no final judgment entered up; there being occasion to prove the debt in Chancery, and the writ of inquiry being lost, a rule was made for a new writ of inquiry and inquisition, according to the sheriff's notes, and that the master should indorse the costs, which by the commitment-book appeared to have been taxed ^q.

ⁿ 6 T. R. 199

^p 2 Str. 878.

^o *Id.* 607

^q *Id.* 1077

CHAPTER XXIV.

Oyer of DEEDS, &c.; COPIES of written INSTRUMENTS; PARTICULARS of DEMAND; and INSPECTING BOOKS, &c.

HITHERTO we have supposed the action to be rightly brought, and considered what is to be done, when the defendant has no merits. We have seen, that in such case, he should compromise or compound the action, confess it, or let judgment go by default. But when the case is different, he should prepare for his defence; and for that purpose may, if circumstances render it necessary, crave *oyer* of deeds, &c. or *copies* of written instruments, call for *particulars* of the plaintiff's demand, or claim *inspection* of public *books*, court-rolls, &c.; or he may move the court to change the venue, consolidate actions unnecessarily divided, or strike out superfluous counts; or he may bring money into court.

Oyer of deeds, &c. is demandable by the plaintiff, or by the defendant. If the plaintiff in his declaration necessarily make a *profert in curiâ* of any deed, writing, letters of administration, or the like, the defendant may pray *oyer*^a; and must have a
copy

^a Append. Chap. XXIV. § 1.

copy thereof delivered to him, if demanded, paying for the same after the rate of four-pence *per* sheet, and also for the stamps ^b. And a defendant who prays oyer of a deed, is entitled to a copy of the attestation, and names of the witnesses, as well as of every other part of the deed ^c. So likewise if the defendant in his plea make a necessary *profert in curiâ* of any deed, &c. the plaintiff may pray oyer^d; and shall have a copy, at the like rate ^e: And the party, of whom oyer is demanded, is bound to carry the deed, &c. to the adverse party ^f. Formerly, all demands of oyer were made in court, where the deed is by intendment of law, when it is pleaded with a *profert in curiâ* ^g: And therefore when oyer is craved it is supposed to be of the court, and not of the party; and the words *ei legitur in hæc verba*, &c. are the act of the court ^h. In practice however, oyer is now usually demanded, and granted by the attornies ⁱ. And where the defendant is entitled to have oyer of a deed, it cannot be dispensed with by the court; nor can he be compelled to plead without it ^k, even though the deed be lost. But where the deed is in the hands
of

^b 2 Salk. 497. R. T. 5 & 6 Geo. II. (b).

^c Willes, 288.

^d Append. Chap. XXIV. § 2.

^e R. T. 5 & 6 Geo. II. (b). 6 Mod. 122.

^f 2 T. R. 40.

^g 12 Mod. 598. 3 Salk. 119.

^h *Id.* 1 Sid. 108. but see 2 Lutw. 1644. *contra*.

ⁱ 6 Mod. 28.

^k 2 Lil. P. R. tit. *Oyer*,

266. 2 Keb. 274. 6 Mod. 28.

2 Str. 1186. 1 Wils. 16

S. C

of a third person, the court will oblige him to give oyer, and produce it ¹.

When a deed is shewn in court, it remains there, in contemplation of law, all the term in which it is shewn; for all the term is considered in law but as one day. And at the end of the term, if the deed be not denied, the law doth adjudge it to be in the custody of the party to whom it belongs; but if it be denied, then it shall remain in court till the plea is determined; and if it eventually turn out not to be a good deed, it shall be destroyed ^m. But letters testamentary, or of administration, are not supposed to remain in court all the term; for the party may have occasion to produce them elsewhere ⁿ. Hence it is, that oyer of a deed cannot in strictness be demanded, but during the same term it is pleaded ^o. And as a general imparlance is always to a subsequent term, it follows that oyer of a deed cannot be demanded after such imparlance ^p. A different doctrine is indeed laid down in one case ^q, which must be understood of a *special* imparlance, to another day in the same term.

Though

¹ 2 Str. 1198.

^m Co. Lit. 231. b. 5 Co. 74.
^b 2 Lutw. 1644.

ⁿ 2 Salk. 497. 12 Mod.
598. S. C.

^o 5 Co. 74. b. 2 Lutw. 1644.

^p T. R. 149.

^p 1 Keb. 32. 2 Lev. 142.

Freem. 400. 3 Keb. 480. 491.
S. C. 6 Mod. 28. but see 2

Ld. Raym. 970.

^q 12 Mod. 99. and see 2

Show. 310.

Though oyer is not in strictness demandable of a *record*^r, yet if a judgment or other matter of record in the *same* court be pleaded, the party pleading it must give a note in writing, of the term and number-roll, whereon such judgment or matter of record is entered and filed; or in default thereof, the plea is not to be received^s. And, probably on this account, the party was not anciently permitted to plead *nul tiel record*, of a judgment or matter of record in the *same* court^t. But where a judgment or matter of record is pleaded in a *different* court, the party, not being entitled to an account of the term and number-roll, must plead *nul tiel record*. And it seems, that oyer is not demandable of an act of parliament^u.

Formerly, the defendant was allowed oyer of the original-writ, in order to demur or plead in abatement, for any apparent insufficiency or variance^v. But this indulgence having been abused, and made an instrument of delay, a rule was made, that a defendant be not allowed oyer of an original-writ; and

^r 1 Ld. Raym. 250. 347. 3 Keb. 76.
 (4th edit. note a.) Doug. 476, ^u Doug. 476. Godb. 186.
⁷ 1 T. R. 149, 50. but see 1 *contra*.
 Ld. Raym. 84. ^v Gilb. C. P. 52. 12 Mod.
^s Keilw. 96. Carth. 454. 35. 189. 2 Lutw. 1644. 6 Mod.
 1 Ld. Raym. 347. Carth. 517. 27. 2 Salk. 498. 2 Ld. Raym.
 1 Ld. Raym. 550. 2 Str. 823. 970. R. T. 5 & 6 Geo. II. (b).
 R. T. 5 & 6 Geo. II. (b). 2 Wils. 97. 6 T. R. 363. Co.
^t 5 Hen. VII. 24. *per Brian*. Ent. 320.

and that if he demand it, the plaintiff may proceed as if no demand had been made ^w.

The demand of oyer is a kind of plea ^x; and should regularly be made before the time for pleading is expired ^y. If it be not made till after that time, the plaintiff may consider the demand as a nullity, and sign judgment. But though oyer be not in strictness demandable, yet if it be given, the party demanding has a right to make use of it ^z. If the defendant would insist upon his demand of oyer, he should move the court to have it entered upon record ^a: if the plaintiff, on the other hand, would contest the oyer, he may either counterplead it, or strike out the rest of the pleading and demur ^b; upon which the judgment of the court is, either that the defendant have oyer, or that he answer without it ^c: On the latter judgment, the defendant may bring a writ of error; for to deny oyer where it ought to be granted is error, but not *à converso* ^d.

There is no settled time prescribed for the *plaintiff* to give oyer; but the defendant shall in all cases have

^w R. T. 19 G. III. Doug. 227, 8. 6 T. R. 363. Barnes, 340. and see Bro. Abr. tit. *Oyer*, pl. 19.

^x 3 Salk. 119.

^y *Fowler and Dyer*, M. 20 G. III. and see 2 Bos. & Pul. 379.

^z Doug. 476, 7.

^a 6 Mod. 28.

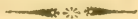
^b 2 Lev. 142. 2 Salk. 497 and see 2 Ld. Raym. 970.

^c 2 Lev. 142.

^d 2 Salk. 497. 6 Mod. 28. 2 Ld. Raym. 970. S. C. 2 Str. 1186. 1 Wils. 16. S. C.

have the same time in term to plead, or as many pleading days, after oyer given, as he had at the time of demanding it^e. And he may either set forth the oyer in his plea or not, at his election^f: If he set it forth, the court must adjudge upon it, as parcel of the record; though it was not strictly demandable, at the time of granting it^g: But the defendant is not bound to set it forth in his plea^h; and if he do not, the plaintiff may pray an inrolment, and so make it part of his replication.

The time allowed for the *defendant* to give oyer of a deed, &c. to the plaintiff, is *two* days exclusive after it is demandedⁱ. And if it be not given in that time, the plaintiff may sign judgment, as for want of a plea^k: If given, the plaintiff shall have the same time to reply, after oyer given him by the defendant, as he had at the time of demanding it^l.



If the action be founded on a written instrument not under seal, the defendant is not entitled to demand oyer: but the distinction formerly taken was,

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|---------------------------------------|---------------------------------------|
| ^e 1 Str. 705. R. T. 5 & 6 | ^h 2 Str. 1241. 1 Wils. 97. |
| Geo. II. (b). 8 T. R. 356, 7. | Barnes, 327. <i>contra</i> . |
| <i>Ante</i> , 426. | ⁱ Carth. 454. 2 T. R. 40. |
| ^f 2 Str. 1241. 1 Wils. 97. | ^k 6 Mod. 122. |
| ^g 3 Salk. 119. Carth. 513. | ^l R. T. 5 & 6 G. II. (b). |
| 6 Mod. 27. Doug. 476. | |

was, that where the plaintiff declared upon a writing, the court, on affidavit that he had no part, would let him have a copy; but where the declaration was on an agreement generally, and the writing but evidence they would not grant it^m. And accordingly, where an action was brought upon a special agreement contained in a note, and a rule made to shew cause, why the plaintiff should not give the defendant a copy; upon cause shewn, the rule was discharged, because the contract upon which the action was founded was a parol contract, of which the note was only evidence, and therefore the defendant ought not to have a copyⁿ. But at present, wherever the action is founded on a written instrument, as a policy of assurance^o, bill of exchange, promissory note, special agreement, or undertaking in writing to pay the debt of a third person, &c. whether it be stated in the declaration to be in writing or not, a judge on summons, without an affidavit, will make an order for the delivery of a copy to the defendant or his attorney, and

^m 2 Keb. 430. 1 Sid. 386.

ⁿ 1 Salk. 215.

^o By the statute 19 Geo. II. c. 37. § 6. in actions upon policies of assurance, the plaintiff, his attorney or agent, shall within fifteen days after being required so to do in writing,

by the defendant, his attorney or agent, declare in writing what sums he hath assured, or caused to be assured, in the whole, and what sums he hath borrowed at *respondentia* or bottomree, for the voyage, or any part of it.

and that all proceedings in the action be in the mean-time stayed. And where the dispute was between the plaintiff a factor in *Smithfield*, and the defendant a grazier; the court, upon the defendant's motion, made a rule for the plaintiff to shew cause, why he should not produce at the trial the several books wherein he entered the accounts of beasts sold, and of monies received, on the defendant's account: and no cause being shewn, the rule was made absolute ^p.

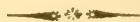
Where the defendant has the custody of a written instrument, which he holds as a trustee, the court in some instances will order him to give an inspection and copy of it to the plaintiff, at his expence, and to produce it for various purposes: Thus, where the defendant was a stakeholder, the court ordered him to give the plaintiff, at his expence, a copy of the articles for *Epsom* races, and to produce the same at the trial ^q. So we have seen, that the plaintiff may have a rule *nisi* for the defendant to produce a deed, before the commissioners of the stamp-office, to be stamped; and also to give the plaintiff a copy of it, in order that he may declare thereon ^r. And where an action is brought by a sailor for his wages, on ship's articles, against the captain, in whose custody they are, it seems that

^p 2 Str. 1130.

^q Barnes, 439.

^r *Ante*, 440.

that under the equity of the statute 2 Geo. II. c. 36. § 8. the defendant, if required, should produce and give a copy of the articles (*). But in general, the court will not oblige a plaintiff to discover the evidence in support of his action, previous to the trial; and therefore they will not make a rule upon him to produce his books, &c^s: Nor can a rule be had for the inspection of books, &c. of a *private* nature, in the hands of third persons^t.



Where the declaration does not disclose the particulars of the plaintiff's demand, as in actions of *assumpsit*, or *debt* for goods sold, or for work and labour, &c. the defendant's attorney or agent may take out a summons before a judge, for the plaintiff's attorney or agent to shew cause, why he should not deliver to the defendant's attorney, or agent, the particulars in writing of the plaintiff's demand, for which the action is brought, and why all proceedings should not in the mean-time be stayed^u. This summons, which cannot it seems be had till after the defendant has appeared^v, is usually taken out before plea; and unless good cause be shewn to the contrary, the judge will make an order^w, agreeably to the summons, which operates
as

^s 6 Mod. 264. but see 4 Bur. 2489.

^t 1 Ld. Raym. 705. 2 Ld. Raym. 927. 1 Barnard. 466. Barnes, 236. Cas. *temp*. Hardw. 130. 2 Blac. Rep. 850.

^u 3 Bur. 1390. and see Append. Chap. XXIV. § 3.

^v 1 Bos. & Pul. 378.

^w Append. Chap. XXIV. § 4.

(*) Abbott on Shipping, 389.

as a stay of proceedings till the particulars are delivered *.

* So if an action be brought on a bond conditioned for the performance of covenants, or to indemnify, &c. the defendant may call for a particular of the breaches, for which the action is brought. And where a general form of declaring is given by act of parliament, as upon the statute 9 Ann. c. 14. or upon the 25 Geo. II. c. 36. it seems reasonable that the plaintiff, if required, should give an account of the particulars of his demand, in order to enable the defendant to prepare for his defence. But wherever the particulars of the demand are disclosed in the declaration, as in *special-assumpsits*, *covenant*, or *debt* on articles of agreement, &c. or in actions on matters of record, an order for such particulars does not seem to be requisite.

In *ejectment*, brought on the forfeiture of a lease, the court will compel the plaintiff to deliver a particular of the breaches of covenant, on which he intends to rely ′. So if the plaintiff declare generally in *ejectment*, and the defendant have any doubt what lands the plaintiff means to proceed for, he may call upon him by a judge's order, to specify them ′: And on the other hand, the plaintiff may call on the defendant, to specify for what he defends, when that is not ascertained by the consent-rule ′. But in general, the injury complained of

‡ But see 2 Bos. & Pul. 363.
C. P. *contra*.

‡ 7 T. R. 332. and the cases there cited.

‡ 6 T. R. 597.

* From the Addenda to the London edition.—“ In *assumpsit* for non-performance of a contract for the sale of a house, with counts to recover back the deposit, the plaintiff having in his first count alleged that the defendant, who was to make a good title, had delivered an abstract which was insufficient, defective and objectionable, the court of common pleas obliged the plaintiff to give a particular of all objections to the abstract, arising upon matters of fact.” 3 Bos. & Pul. 246.

of in actions for wrongs, is stated in the declaration: and therefore in such actions, it is not usual to make an order for the particulars: but circumstances may occur, which render it necessary.

As the defendant is allowed to call for the particulars of the plaintiff's demand, so when the defendant pleads or gives a notice of *set-off*, for goods sold, &c., the plaintiff may take out a summons for the particulars; upon which the judge will make an order for the defendant to deliver them in a certain time, or in default thereof, that he be precluded from giving evidence at the trial, in support of his set-off. Under a judge's order for particulars, the plaintiff or his attorney or agent should deliver a particular account in writing of the *items* of the demand, and when and in what manner it arose: And where there has been an account current, and payments have been made, for which the party means to give credit, it is said that the particular ought to contain as well those matters for which he means to give credit, as those for which the action is brought ^a. But it is sufficient to refer in a bill of particulars, to an account already delivered, without restating it ^b. If the particulars delivered under a judge's order be not sufficiently explicit, the party to whom they are delivered may take out a summons, and obtain an order for *further* particulars: and if, on the other hand,

^a Esp. Cas. *Ni. Pri.* 280.

^b Peake, Cas. *Ni. Pri.* 179.

hand, they are incorrect, or not sufficiently comprehensive, the party delivering them may have a summons and order to *amend* them ^c.

At the trial, the particulars of the plaintiff's demand, or of the defendant's set-off, if delivered, are considered as incorporated with the declaration, plea, or notice; and on production of the order, and proof of their delivery, the parties are not allowed to give any evidence out of them ^d.^{*} But an *item* of the plaintiff's demand, appearing on the face of the defendant's set-off, given in under a judge's order, is not such an admission as supercedes the necessity of the plaintiff's proving it ^e. If the particulars of the defendant's set-off are not delivered, within the time mentioned in the judge's order, the defendant is precluded by the terms of it, from giving any evidence in support of his set-off. In an action of *assumpsit* brought by the assignees of a bankrupt, the defendant called for the particulars of the plaintiff's demand, which were given him, and then pleaded in abatement, that the promises were made by himself and another person jointly: issue being joined on this plea, it appeared in evidence at the trial, that the particulars chiefly

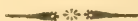
^c And an amendment was allowed, in the Common Pleas, after the plaintiff had been nonsuited for a defect in the bill of particulars, and a new trial granted, on payment of costs. 2 Bos. & Pul. 245.

^d Peake, Cas. *Ni. Pri.* 172.
1 Esp. Cas. *Ni. Pri.* 195. 3
Esp. Cas. *Ni. Pri.* 168. 2
Bos. & Pul. 243. S. C. 2 Sel.
Pr. 463.

^e 2 Esp. Cas. *Ni. Pri.* 602.

^{*} From the *Addenda to the London edition*.—"Therefore where the particular of the plaintiff's demand was a promissory note only, and on being produced it appeared to be improperly stamped, so that it could not be given in evidence, the plaintiff, though he might otherwise have gone into the consideration of the note, was held to be precluded therefrom by his particular." 4 Esp. Cas. *Ni. Pri.* 7

chiefly related to transactions between the bankrupt and the defendant jointly with the person mentioned in the plea; and though there were some *items* which concerned the defendant only, yet as these were not distinguished from the rest, the chief-justice would not suffer them to be given in evidence, and nonsuited the plaintiff: The court was afterwards moved, but refused to set aside the nonsuit ^f.



We have already seen, that the parties are not entitled to the inspection of books, &c. of a *private* nature ^g. But it is a general rule, that a party has a right to inspect and take copies of such books, &c. as are of a *public* nature, wherein he has an interest; so as they be material to the suit, and the party in possession be not obliged to furnish evidence against himself, in a criminal prosecution ^h. And if they are not evidence of themselves, the court will order them to be produced at the trial ⁱ; otherwise a copy is sufficient: And they will never make a rule to produce the original, unless it be necessary to inspect it, on account of an erasure or new entry ^k.

The

^f *Colson and others, assignees, &c. v. Selby*, E. 36 G. III. 1 Esp. Cas. *Ni. Pri.* 452. S. C.

^g *Ante*, 534.

^h 1 Blac. Rep. 44.

ⁱ 1 Str. 126. 12 Vin. Abr. 104. pl. 68. S. C. Barnes, 468. 2 T. R. 234.

^k 1 Str. 307. Say. Rep. 76.

The books of the *Sessions* are considered as public books, which every one has a right to inspect^l. And every man has a right to inspect the proceedings, to which he himself is a party^m; for he has an interest in such proceedings. But upon an indictment for felony, it is not usual to grant a copy of the record of acquittal, where there is any the least probable cause for the prosecutionⁿ.

Parish-books, and the books of the *Custom-house*, *Post-office*, *Bank*, *South-Sea house*, *India company*, &c. are to some purposes considered as public books; and persons who have an interest therein, have a right to inspect them^o. So the books of the commissioners of the *lottery*, and their numerical lists are of a public nature; and are kept by the commissioners in trust for the ticket-holders, who are entitled to an inspection of them, by rule of court^p. But access is not allowed to parish-books^q, &c.

^l 1 Wils. 297. *Rex v. Berk- 421. S. C. 3 Blac. Com. 126.*
ing, cited in 1 Wils. 240. 1 But see 2 Str. 1122. 1 Blac.
 Blac. Rep. 39. S. C. Rep. 385. Leach's Cr. Law, 25.

^m 1 Str. 126. 12 Vin. Abr. ^o 2 Ld. Raym. 851. 7 Mod.
 104. pl. 68. S. C. Cas. *temp.* 129. S. C. 1 Str. 304. 1 Bar-
 Hardw. 128. 2 Str. 1242. nard. 455. 2 Str. 954. Barnes,
 Barnes, 236. 468. But see 1 236.

Ld. Raym. 252. Carth. 421. ^p *Schinotti v. Bumstead* and
 S. C. Gilb. Cas. B. R. 134. others, H. 36 G. III.

(*Dr. West's Case*) 2 Str. 1005. ^q As to *parish*-books, see
 1 Wils. 240. 1 Blac. Rep. 41. 5 Mod. 395. 1 Ld. Raym. 337.
 S. C. cited. Say. Rep. 250. S. C. 12 Vin. Abr. 147.

ⁿ 1 Ld. Raym. 253. Carth. pl. 11. 1 Barnard. 100.
 1 Wils.

&c. for the trial of questions of a *private* nature, or in *collateral* actions, brought by or against persons who have no interest therein. And though the *East-India* Company are compellable to produce their public books^r, yet they are not obliged to produce their books of letters^s, &c.; nor their private books, relating to the appointment of their servants^t.

The *Court-rolls* and books of a manor are of a public nature, the tenants have an interest therein, and the lord who has the custody of them, is considered merely as a trustee^u: Hence it is of course, to grant leave to inspect the court-rolls, &c. of a manor, on the application of a tenant of the manor, who has been refused that permission by the lord^v. But this privilege is confined to the tenants of the manor: for the lord or tenants of a different manor, having no interest in the court-rolls, &c. cannot claim the inspection of them^w. And a *freehold* tenant of a manor has no right to inspect the court-

i Wils. 240. but see 1 Blac. Rep. 27. And as to *custom-house* books, &c. see 1 Ld. Raym. 705. 2 Str. 1005. 1 Wils. 240. Say. Rep. 250. 1 Blac. Rep. 40. S. C. but see Barnes, 235. Com. Rep. 555. S. C.

r 7 Mod. 129. 2 Ld. Raym. 351. S. C.

s 1 Str. 646.

t 2 Str. 717.

u *Id.* 955. 1005.

v 3 T. R. 141. and see Barnes, 236. 2 Blac. Rep. 1061. *accord*.

w 12 Vin. Abr. 146. Bunb. 269. 2 Str. 1005. 3 T. R.

142.

court-rolls, unless there be some cause depending, in which his right may be involved^x.

So the books of a *Corporation* are in nature of public books^y; and every member of the corporation, having an interest therein, has a right to inspect and take copies of them, for any matter that concerns himself, though it be in a dispute with others^z. But pending an action by a corporation for tolls, the court will not grant leave to inspect the corporation books or muniments, on the application of the defendant, a stranger to the corporation^a: And the inspection, when granted, is confined to the subject matter in dispute^b. These rules of inspection, in cases of copyholds, corporations, &c. are never granted, but only where *civil* rights are depending^c; for it is a constant and invariable rule, that in *criminal* cases, the party shall never be obliged to furnish evidence against himself^d.

The

^x 7 T. R. 746. and see 1 Mod. 395. 1 Ld. Raym. 337. Wils. 104. where a *freeholder* was refused a rule to inspect the rolls of the manor, in a case between himself and the lord, touching a *copyhold*. But see Barnes, 237. 2 Blac. Rep. 1030. *semb. contra*; and see 2 Vez. 620.

^y 2 Str. 954, 5.

^z *Id.* 1223. Barnes, 235. Com. Rep. 555. S. C.

^a 8 T. R. 590. and see 5

Mod. 395. 1 Ld. Raym. 337. S. C. 2 Str. 1203. Barnes, 238. 3 Wils. 398. 2 Blac. Rep. 877. S. C. *accord.* 1 T. R. 689. 3 T. R. 303. 1 H. Blac. 211. *contra*.

^b 1 Barnard. 455. 2 Str. 1005. 1223. 1 Wils. 239. 1 Blac. Rep. 40. S. C. 3 T. R. 303. but see 3 T. R.

579.

^c 1 Wils. 240.

^d 1 Ld. Raym. 705. 2 Ld.

Raym

The motion for leave to inspect books, &c. is founded on an affidavit, stating the circumstances under which the inspection is claimed, and that it has been demanded and refused ^e. If a rule be made to shew cause why an information should not be filed, in nature of a *quo warranto*, the court will make a rule for the prosecutor to inspect and take copies of books and records, as soon as the rule to shew cause is granted ^f: but if a rule be made to shew cause why a *mandamus* should not be awarded, the court will not make a rule for the prosecutor to inspect and take copies of books and records, until the rule be made absolute, and a return made to the *mandamus* ^g. And in an action against a corporation, upon a right of toll, the court refused a rule to inspect the public books, records, and writings of the corporation; because no issue was joined, so that it could not appear whether such inspection would be necessary ^h.

Raym. 927. 2 Str. 1210. 1 *notis*.

Wils. 239. 1 Blac. Rep. 37. ^f Cas. *temp*. Hardw. 245.

S. C. *Id*. 351. S. P. 4 Bur. Say. Rep. 145. but see 3 T. 2489. 1 T. R. 689. 3 T. R. R. 581.

142. ^g Say. Rep. 145. 1 Ld.

^e Barnes, 236. 3 Wils. 399. Raym. 253. *accord*.

Where no action is depending, ^h 2 Blac. Rep. 877. 3 Wils. 398. S. C. 1 Ld Raym. 253. as to which, see Mr. Nolan's Carth. 421. S. C. *accord*.
edition of *Strange*, p. 1223. *in*

CHAPTER XXV.

Of CHANGING THE VENUE, CONSOLIDATING ACTIONS, *and* STRIKING OUT COUNTS.

THE law having settled the distinction between *local* and *transitory* actions, it seems that towards the reign of *Rich. II.* it was greatly abused^a; for a litigious plaintiff would frequently lay his action in a foreign county, at a great distance from where the cause of it arose, and by that means oblige the defendant to come with his witnesses into that county. To remedy which, it was ordained by statute^b, “to the intent that writs of debt and
 “accompt, and all other such actions, be from
 “henceforth taken in their counties, and directed
 “to the sheriffs of the counties where the contracts
 “of the same action did arise; that if from hence-
 “forth, in pleas upon the same writs, it shall be
 “declared, that the contract thereof was made in
 “another county than is contained in the original-
 “writ, that then the same writ shall be utterly
 “abated.” The design of this statute was to compel the suing out of all writs arising upon contract, in the very county where the contract was made^c,
 agreeably

^a Gilb. C. P. 89.^c 2 Blac. Rep. 1032.^b 6 R. II. c. 2.

agreeably to the law of *Henry* the first ^d, *Unusquisque per pares suos judicandus est, et ejusdem provinciae; peregrina vero judicia modis omnibus submovemus* ^e. But as the statute only prescribes, that the count shall agree with the writ, in the place where the contract was made, it did not effectually prevent the mischief ^f: And therefore a statute of *Henry* the fourth ^g directs all attornies to be sworn, that they will make no suit in a foreign county; and there is an old rule of court ^h, which makes it highly penal for attornies to transgress this statute.

Soon after the statute of *Henry* the fourth, a practice began of pleading in abatement of the writ, the impropriety of its venue, even before the plaintiff had declared ⁱ. At first, in the reign of *Henry* the fifth, they examined the plaintiff upon oath, as to the truth of his venue: But soon after, they began to allow the defendant to traverse the venue, and to try the traverse by the country ^k. This practice being subject to much delay, the judges introduced the present method of changing the venue upon motion, on the equity of the above statutes; which Lord *Holt* says ^l, began in the time of *James* the first: And accordingly we find, that among the fees of this court, as found by a jury, under

^d *Leg. Hen. I. c. 31.*

^e *Gilb. C. P. 89. in notis.*

^f 2 *Blac. Rep.* 1032.

^g 4 *Hen. IV. c. 18.*

^h *R. M.* 1654. § 5

ⁱ 2 *Blac. Rep.* 1033.

^k *Rastal, tit. Debt, 184. (b).*

Fitz. Abr. tit. Brief, 18.

^l 2 *Salk.* 670.

under the king's commission in 1630, one is, "for every rule to alter a *visne* ^m." The form of the rule and affidavit are also stated by *Styles* ⁿ, as established in 23 *Car. I*.

But whenever the practice began, it is now settled, that in *transitory* actions, the venue may be changed upon motion, either by the plaintiff or defendant. The plaintiff shall not *directly* alter his venue after the essoign-day of the next term after appearance; though he would pay costs, or give an imparlance ^o: Yet he may in effect do it, by moving to amend ^p; and that, after the defendant has changed the venue ^q, or pleaded ^r, and even after two terms have elapsed from the delivery of the declaration ^s.

The defendant is in general allowed to change the venue in all *transitory* actions, arising in a county different from that where the plaintiff has laid it ^t; and he may even change it from *London* to *Middlesex* ^u, or *vice versa* ^v. But the venue cannot be changed in *local* actions ^w. And in *transitory* actions, where material evidence arises in two counties, the venue may be laid in either ^x: And if it be laid in
a third

^m Trye's *jus fil.* 231.

^s Say. Rep. 150. 294.

ⁿ Sty. P. R. (ed. 1707.)

^t R. M. 1654. § 5.

631.

^u 2 Str. 857.

^o *Id.* 625. R. M. 10 Geo. II.

^v 2 T. R. 275.

reg. 2. (c).

^w Say. Rep. 146.

^q 2 Str. 1162.

^x 7 Co. 2. a. 2 Salk. 669.

^p *Id.* 1202.

R. M. 10 Geo. II, reg. 2. (c).

^r 1 Wils. 173.

2 T. R. 275. 7 T. R. 583.

a third county, the court will not change it; for the defendant in such case cannot make the necessary affidavit, that the cause of action arose in a particular county, and not elsewhere. Thus, where the venue was laid in *London*, and it appeared from the affidavit, that the cause of action arose upon a bridge called *King's-bridge*, partly in the county of *Kent*, and partly in the county of the city of *Canterbury*, and not elsewhere, the court refused to change the venue ^y.

Where the cause of action arises out of the realm, the court will not change the venue; because the action may as well be tried in the county where the venue is laid, as in any other where the cause of action did not arise ^z. And in other cases, we have just seen, that in order to change the venue, it is indispensably necessary that the cause of action should be *wholly* confined to a single county. Therefore in an action of *debt* on bond, or other specialty ^a, the court will not change the venue, unless some special ground be laid ^b; for *debitum et contractus sunt nullius loci*, and bonds and other specialties are

^y 1 Wils. 178.

C. P. 90. *Balein v. Kent*, E.

^z Say. Rep. 77. Cowp. 176.
and see 1 H. Blac. 280.

20 Geo. III. *Barnes*, 491.

Or on an award. 2 Bos. &

^a 1 Keb. 65. 1 Sid. 87. Sty.

Pul. 355.

P. R. 631. 2 Str. 878. Andr.

^b *Pole v. Horobin*, M. 22

56. R. M. 10 Geo. II.

Geo. III. 1 T. R. 781. and

(c) Gilb. K. B. 339. Gilb.

see 1 Bos. & Pul. 425.

are *bona notabilia*, wherever they happen to be ^c. In analogy to which it is now holden ^d, agreeably to the practice of the court of common pleas ^e, that the venue cannot be changed in an action upon a promissory note or bill of exchange. But the venue may still be changed in an action upon a policy of insurance ^f, not being by deed; or in any other action, the right of which is founded upon simple contract ^g.

In an action for *scandalum magnatum*, the court will never change the venue ^h; because a scandal raised of a peer of the realm is not confined to any particular county, but reflects on him through the whole kingdom: and he is a person of so great notoriety, that there is no necessity for obliging him to try his cause to the neighbourhood. So in an action for a libel, published in a newspaper in one county, and circulated in other counties ⁱ, or contained in a letter, written by the defendant in one county, and directed into another ^k, the court will

^c 1 T. R. 571.

1036. 2 Bos. & Pul. 355.

^d Andr. 66. *per Chapple*
Just. R. M. 10 Geo. II. (c).
Precious v. Bennet, E. 25 Geo.

III. 1 T. R. 571. but see the
opinion of the other justices in
Andr. 66. 1 Wils. 41. Say.
Rep. 7. *contra*.

^e Barnes, 480. 483. 485.
487. 491. 2. 2 Blac. Rep.

^f Andr. 66. 2 Str. 1180.
Say. Rep. 7. 2 T. R. 275.
7 T. R. 205.

^g Say. Rep. 7.

^h 1 Lev. 56. 2 Salk. 668.
Carth. 400. S. C. 2 Str. 807.
Barnes, 482. Gilb. C. P. 90.

ⁱ 1 T. R. 571.

^k *Id.* 647

will not change the venue; because the defendant cannot make the common affidavit, that the cause of action arose in a single county, and not elsewhere; And for a similar reason, the venue cannot be changed in an action against a carrier or lighter-man^l, or for an escape^m, or false returnⁿ. So in an action for infringing a patent, the plaintiff cannot change the venue from *Middlesex*, to any other county^o. But in an action for a libel, the court will change the venue into a county, in which it was both written and published^p: And the distinction seems to be, between a libel which is dispersed through several counties, and a letter which is written in one county, and not opened in another; on the former, the venue cannot be changed, on the latter it may^q.

Though the court in general will not change the venue, where it is laid in the proper county, yet they will change it even then, upon a special ground: Thus in *debt* on bond, where the venue was laid in *London*, and the plaintiff's and defendant's witnesses lived in *Lincolnshire*, the court changed it into the latter county^r. * And where a fair

^l 2 Salk. 670.

^p 3 T. R. 306. *Aris v. Tay-*

^m *Id.* 1 Keb. 65. 1 Sid. 87. *lor*, T. 35 Geo. III.

ⁿ 2 Salk. 669. 2 Str. 727. ^q 3 T. R. 652.

Say. Rep. 54. 1 Wils. 336. S. C.

^r 1 T. R. 781. and see 1 Bos. & Pul. 425. but see 1

^o 6 T. R. 363. 1 East, 115.

Wils. 162. 1 T. R. 782. *in notis.*

(a).

* *From the Addenda to the London edition.* "So where the cause of action arises in another county than that in which the venue is laid by the plaintiff, and the convenience and justice of the case require the trial to be had there, all the witnesses residing at a great distance from the county where the venue is laid, the court, on the application of the defendant, will change the venue, on his agreeing to admit a particular fact, which in point of form exists in the original county."

3 East, 329.

fair and impartial trial cannot be had in the county where the venue is laid, the court, on an affidavit of the circumstances, will change it, in *transitory* actions^s; or in *local* actions, will give leave to enter a suggestion on the roll, with a *nient dedire*, in order to have the trial in an adjoining county^t. So the parties by consent may change the venue in local actions^u, or have them tried out of their proper county, such consent being entered by suggestion on the roll^v.

On the other hand, though the court will in general change the venue, where it is not laid in the proper county, yet if an impartial or satisfactory trial cannot be had there, they will not change it; as in an action for words spoken of a justice of the peace, by a candidate upon the hustings, at a county election^w. And in order to avoid delay, the court will not change the venue, except by consent, into a *northern* county, or into the city of *Bristol* or *Norwich*, where there are no Lent assizes, in *Michaelmas* or *Hilary Term*^x; nor into *Hull*, *Canterbury*, &c. where the justices of *nisi prius* seldom come^y;
nor

^s 2 Str. 874. 3 Bur. 1564. 1 Blac. Rep. 480. S. C. but see ^w Cowp. 510. and see 2 Salk. 670. 4 Bur. 2447.

1 Barnard. K. B. 253.

^t 10 Mod. 198. 1 Str. 235. 3 Bur. 1334. 1 T. R. 363.

^u 1 Wils. 298. *Groves v.*

Durall, H. 38 Geo. III.

^v *Fonnereau v. Fonnereau*, 490.

per Cur

^w Cowp. 510. and see 2 Salk. 670. 4 Bur. 2447.

^x 2 Str. 1180. 1216. 1 Wils. 138. *Per Cur.* M. 37 G. III. and see 3 Blac. Com.

294.

^y R. M. 1654. § 5. *Barnes*,

nor into the city of *Worcester* or *Gloucester*, out of the county at large, because the assizes for the city and county at large are holden at the same place. But the venue may be changed, as a matter of course, into a *northern* county, or into the city of *Bristol*^z, &c. previous to the summer assizes.

So, where the venue is not laid in the proper county, the *privilege* of the plaintiff will in some cases prevent the court from changing it. Thus in an action brought by a barrister^a, attorney^b, or other officer of the court^c, if the venue be laid in *Middlesex*, the plaintiff, suing as a privileged person, has a right to retain it there, on account of the supposed necessity of his attendance on the court: But if the venue be laid in any other county, as in *London*^d; or the plaintiff, though privileged, sue as a common person, by original or otherwise^e, or *en auter droit*, as executor or administrator, or jointly with his wife or other persons^f, he has no such privilege. And where a barrister, attorney, or other officer

^z *Stanley v. Preston*, T. 24 153. 180. Barnes, 479. *Ante*, Geo. III. *Tucker v. Morgan*, 264. 272.

E. 35 Geo. III. ^c 2 Salk. 670. 2Ld. Raym.

^a 2 Show. 176. 242. 1 Mod. 1253.

64. Sty. Rep. 460. 2 Salk. ^d 2 Salk. 668.

668. 2 Ld. Raym. 1556. 2 ^e Pr. Reg. 419, 420. Barnes, Str. 822. 1 Wils. 159. 1 Blac. 479. 484.

Rep. 19. S. C. ^f R. M. 10 Geo. II. reg. 2.

^b 2 Salk. 668. Say. Rep. (c).

officer of the court, is *defendant*, he has no privilege whatever, respecting the venue ^g.

Where the cause of action arises in *Wales*, and the venue, is laid elsewhere, it cannot be changed, without consent, into the next adjoining English county^h; because the defendant cannot make the common affidavit, which is never dispensed with, that the cause of action arose in that particular county and not elsewhereⁱ. And it has been doubted, whether the venue can be changed, otherwise than by consent, directly into *Wales*^k; inasmuch as no trial can be had there, but the issues (if any) must be tried in the next adjoining English county: And if the defendant let judgment go by default, it is doubtful whether the court can award a writ of inquiry. The venue, however, has been frequently changed into the counties *palatine*; because the court can send down the record there by *mittimus*^l: And, in one instance, it was changed into the next adjoining county^m. But where the
venue

^g Carth. 126. Show. 148. ^k 2 Str. 1270. 1 Wils. 222.
4 Bur. 2027. 3 T. R. 573. Say. Rep. 48. 4 Bur. 2450.
Barnes, 482. Pr. Reg. 419. 2 Blac. Rep. 962. Doug. 262.
but see 2 Salk. 668. 1 Str. 3. and see the stat. 13 Geo.
610. 2 Str. 1049. *contra*. III. c. 51. § 1, 2.

^h 2 Str. 1258. 1 Wils. 138. ^l 2 Ld. Raym. 1418. 1 Wils.
S. C. It is always changed into 222. 7 T. R. 735. but see
the Welch county, and never 2 Str. 807. Pr. Reg. 428, 9.
immediately into the next En- Barnes, 478. 481. 488. *con-*
glish county. *Powell v. Wil-* *tra*.
kins, H. 37 Geo. III. ^m 12 Mod. 313.

ⁱ 4 Bur. 2452.

venue is changed into a county-palatine, the court will require an undertaking from the defendant, not to assign error for want of an originalⁿ. Where the cause of action arises in *Berwick*, and the venue is laid elsewhere, it is not settled, whether it can be changed into *Northumberland*, as being the next adjoining county^o: But it seems that the court, upon a proper suggestion, will order the cause to be tried there^p.

The motion for a rule for the defendant to change the venue is a motion of course; and must formerly have been made within eight days after the declaration delivered^q, which was the time allowed, by the rules of the court, for pleading^r: And accordingly it is said^s, that if a declaration be delivered so early in term, that the defendant has eight days in that term, he cannot move to change the venue the next term. But it is now settled, that the defendant may move to change the venue, at any time before plea pleaded^t: and he is even allowed to change it, after an order for time to plead, though upon the terms of pleading issuably^u; but not after an order for time to plead, where the terms are to plead issuably, and take short notice of trial,

ⁿ 1 Sel. 272.

^o 2 Blac. Rep. 1036.

^p 2 Bur. 859.

^q 2 Salk. 688.

^r *Id.* 2 Str. 1192.

^s 1 Str. 211.

^t R. M. 1654. § 5. Gilb. K. B. 339. Willes, 318. Barnes, 489. S. P.

^u Say. Rep. 207. 2 Bos. & Pul. 320.

trial, at the first or other sittings within term, in *London* or *Middlesex*; because a trial would by that means be lost ^v. And the venue cannot be changed, at the instance of the defendant, after plea pleaded; even though he afterwards have leave to withdraw his plea, and plead it *de novo*, with a notice of set-off ^w.

In order to change the venue, the defendant must make a positive affidavit, *that the plaintiff's cause of action (if any) arose in the county of A. and not in the county of B.* (where the venue is laid), *or elsewhere out of the county of A* ^x. An affidavit was necessary, because the motion to change the venue succeeded and was equivalent to a plea in abatement ^y; and the form of the affidavit, which was settled so long ago as the reign of King *Charles the second* ^z, has been ever most religiously adhered to ^a.

Where the court see that the venue has been improperly changed, they will discharge the rule for

^v Cowp. 511. 7 T. R. 698. to change it. 3 Bos. & Pul. 12. Barnes, 493. 2 Bos. & Pul. 320. 3 Bos. & Pul. 12. but see 1 Wils. 245. *contra*.

^w *Palmer and Turner*, H. 26 Geo. III. But in the common pleas, if the defendant plead, pending a rule *nisi* for changing the venue, the court will notwithstanding allow him

^x Sty. P. R. 631. R. M. 10 Geo. II. reg. 2. (c). 3 T. R. 495. and see Append. Chap. XXV. § 1. and for the rule thereon, see § 2.

^y 2 Blac. Rep. 1033.

^z 1 Sid. 185. 442.

^a Say. Rep. 77. 4 Bur. 2452

3 T. R. 494.

for changing it, and by that means bring the venue back to the county where it was originally laid: as if the venue be changed from A. to B. on the usual affidavit, that the cause of action arose wholly in B. when in fact part of the cause of action arose in another county, the court will order the venue to be brought back to A^b. And in general, as it would be hard to conclude the plaintiff, by the single affidavit of the defendant, he is at liberty to aver, that the cause of action arose in the county where the venue is laid, and to go to trial thereon, at the same time that the merits are tried; by undertaking to give material evidence, arising in that county^c: And upon such undertaking, the court will discharge the rule for changing the venue^d. This practice is equivalent to joining issue, that the cause of action arose in the first county: and if the plaintiff fail in proving it, he must be nonsuited at the trial; which has in this case the same effect, as quashing the writ by a judgment on a plea in abatement, viz. *quod defendens eat sine die*, and the plaintiff must begin again^e. Originally it was required, that the plaintiff should give *no* evidence at the trial, but what arose in the county wherein the venue was retained^f: And if he gave no such evidence, he must have been nonsuited of course. But when it was laid down

(more

^b 7 T. R. 205.

^c 2 Blac. Rep. 1033.

^d 2 Salk. 669.

^e Gilb. C. P. Chap. VII.

^f 1 Keb. 859. 1 Sid. 442.

(more liberally) in *Swaine's* case^g, that the plaintiff might lay his venue in any county, wherein part of the cause of action arose, he was then bound only to give *some* evidence, and not the whole (*dare aliquam evidentiam*,) in the county where the venue was laid^h; which continues to be the rule at this day. The evidence however must be material; and therefore it is not sufficient merely to prove, that the witnesses to the contract reside in the county where the venue is laidⁱ. But where a rule to change the venue from *Middlesex* to *London* was discharged, on the plaintiff's undertaking to give material evidence in *Middlesex*, the court held, that the undertaking was complied with, by proving a rule of court, obtained by the defendant in *Middlesex*, for paying money into court^k; although that rule was obtained, after the rule for changing the venue was discharged.

It was formerly holden, that the plaintiff must move to discharge the rule for changing the venue, before replication^l; and therefore that he came too late after issue was joined, and delivered to the defendant's agent^m. But now, as the plaintiff may alter his venue, by moving to amendⁿ, so, for avoiding circuitry, he may move
to

^g 1 Sid. 405.

^l 2 Str. 858.

^h 2 Salk. 669. 12 Mod. 515.

^m ——— v. *Boddington* and

ⁱ 2 Blac. Rep. 1031.

others, M. 20 Geo. III. K. B.

^k 2 T. R. 275.

ⁿ *Ante*, 545.

to discharge the rule for changing the venue, on undertaking to give material evidence in the county where it is laid, at any time before the cause is tried: And it was accordingly discharged in one case, after the cause had been twice taken down for trial °.



If two actions are depending at one time, by the same plaintiff, against the same defendant, for causes which may be joined, and particularly if the defendant is holden to bail in both, the court will compel the plaintiff to consolidate the actions; and on account of the vexation, to pay the costs of the application^q. But where three actions were successively brought by the same plaintiff against the same defendant, upon three notes of hand, which became due at different times, the court refused to consolidate them^r. And the court will not consolidate actions against different defendants: Thus, where it was moved that four several declarations in *trespass*, against four different defendants, might be put into one, on an affidavit that the trespass, if any, was committed by all jointly; the court said, they never went so far as the case of different defendants, but only where the declarations are between the same parties: The plaintiff may have the

° Cowp. 409.

^r *Mussenden and O'Hara*, M.

^q 2 T. R. 639. but see 2 Str. 25 Geo. III.

1149. 1178. *semb. contra*.

the benefit of the other's evidence, in his action against either; but this would be to deprive him of that benefit ^s.

In actions upon a policy of assurance against several underwriters, the court, by consent of the plaintiff, will make a rule, on the application of the defendants, which is called the *Consolidation*-rule, for staying the proceedings in all the actions except one, upon the defendants' undertaking, to be bound by the verdict in that action, and to pay the amount of their several subscriptions and costs, in case a verdict shall be given therein for the plaintiff. This rule, though attempted before without success ^t, was introduced by Lord *Mansfield* into general use, to avoid the expence and delay arising from the trial of a multiplicity of actions upon the same question ^u; and if the plaintiff will not give his consent, the court have the power of granting imparlances in all the actions but one, till the plaintiff has an opportunity of proceeding to trial in that action ^v. On the other hand, if the plaintiff consent to the rule, the court will make the defendants submit to reasonable terms, such as admitting the policy, producing and giving copies of books and papers, and undertaking not to file a bill in equity, or bring a writ of error ^w.

But

^s 1 Str. 420. and see Cas.
temple. Hardw. 137.

^t 2 Barnard. K. B. 103

^u Parke's Insur. *Introd.*

^v *Id. ibid.*

^w *Id. ibid.*

But though the defendants undertake to be bound by a verdict in one action, yet this must be understood to mean such a verdict as the court think ought to stand, as a final determination of the matter; and therefore where the defendant, after a verdict for the plaintiff in one action, obtained a new trial, the court would not make a rule, previous to the new trial, for the other defendants to pay the money to the plaintiff, pursuant to their undertaking *. The defendants in several actions on a policy of insurance, paid money into court, which the plaintiff took out, without taxing the costs at that time; afterwards they entered into the common consolidation rule; and the plaintiff being nonsuited in the action that was tried, the court held that the latter was not entitled to the costs in any of the actions, up to the time of paying money into court †. In actions upon a policy of insurance, against several underwriters, where the parties had not entered into a consolidation-rule, the attorney for the plaintiff made out a full brief in one cause, but only a short statement in the rest; and the master, on taxation, having allowed for full briefs in all the causes, the court made a rule for him to review his taxation ‡.



As the court, for the sake of avoiding expence, will consolidate unnecessary actions, so when it appears,

* 3 Bur. 1477.

† 7 T. R. 372.

‡ *Martineau v. Barnes and others*, H. 23 Geo. III.

pears, on the face of the declaration, that some of the counts are superfluous, the court will order them to be expunged; and if there be any vexation, will make the plaintiff pay the costs of the application. Thus, where several counts in a declaration are precisely the same, or, which more frequently happens, there is only a formal difference between them, and the same evidence will support each^a, as if the plaintiff declare specially and generally, for a matter that may be given in evidence upon a general count, the court will expunge the superfluous counts: And it seems reasonable that they should expunge such counts as appear, by reference to the bill of particulars, to be altogether inapplicable to the plaintiff's case^b. But where there is a material difference between the counts^c, the court will not determine, upon affidavits, whether they are well founded in point of fact; for if not, the plaintiff will be sufficiently punished by paying the costs, which he will be subject to, on such of the counts as are found for the defendant^d.

If

^a *Cas. temp. Hardw.* 129.

^b This point came before the court, in the case of *Arbouin v. Wyatt*, M. 38 G. III. but was not determined; the rule being discharged, for want of an affidavit to identify the bill of particulars.

^c In the case of *Cowan v. Berry*, E. 38. G. III. the declaration which was in debt

for penalties on the statute 9 Ann. c. 14. consisted of 480 counts, for money won at play, of different persons, at different times; and the court granted a rule *nisi*, for limiting the declaration to ten counts; but on shewing cause, the rule was discharged with costs.

^d *Hurd v. Cock*, M. 36 G. III. Imp. K. B. 754.

If a declaration be unnecessarily long, the court will order the superfluous matter to be expunged; as where, in an action of *covenant* upon an indenture, the plaintiff recites the whole of it, and not merely such parts as are necessary^e; or where, in an action of *trover*, he sets out a long inventory of goods, with frequent and unnecessary repetitions and descriptions. In these cases, when the objection is clear, the court will order the superfluous counts or matter to be expunged, on motion, in the first instance; but otherwise they will refer it to the master, and decide upon his report.

^e Cowp. 665. 727. and see 2 H. Blac. 123.

CHAPTER XXVI.

Of BRINGING MONEY into COURT.

THE practice of bringing money into court was first introduced in the reign of *Car. II.* at the time when *Kelynge* was chief-justice, to avoid the hazard and difficulty of pleading a tender^a. And it is allowed in cases where an action is brought upon contract, for the recovery of a debt^b, which is either certain, or capable of being ascertained by mere computation, without leaving any sort of discretion to be exercised by the jury^c. In these cases, when the dispute is not whether any thing, but how much is due to the plaintiff, the defendant may have leave to bring into court any sum of money he thinks fit; and the court will make a rule, that unless the plaintiff accept of it, with costs, in discharge of the action, it shall be struck out of the declaration, and paid out of court, to the plaintiff or his attorney; and the plaintiff, upon the trial, shall not be permitted to give evidence for the sum brought in^d: which rule

^a 1 *Ld. Raym.* 255. 2 *Salk.*^c 2 *Bur.* 1120.597. 2 *Str.* 787. *Cas. temp.*^d *Say. Rep.* 196, 7. 2 *Bur.**Hardw.* 507. but see *R. H.* 51121. 3 *Bur.* 1773. *Imp. K.**Jac. I.**B.* 261, 2.; and see *Append.*^b *Com. Dig.* tit. *Pleader*, Chap. XXVI.*C.* 10.

rule should be accompanied with the general issue, or other plea, to the residue of the demand ^e,

Thus in *assumpsit* ^f, or *covenant* ^g for the payment of money, the defendant may bring money into court: and in *covenant* to find diet and lodging, or pay ten pounds, the court allowed him to bring in the ten pounds ^h. In *debt* for rent, the defendant was formerly allowed to bring money into court ⁱ; as is done in the Common Pleas ^k, and Exchequer ^l: which still continues to be the practice, though this court refused it, in the time of lord *Hardwicke* ^m; and in a case previous to that time ⁿ, the court said they never did it in *debt*. But there is a distinction between those actions of *debt*, wherein the plaintiff cannot recover less than the sum demanded, as on a record, specialty, or statute, giving a sum certain by way of penalty ^o; and those actions wherein the plaintiff may recover less, as in *debt* for rent ^p, or on a simple contract ^q. In the former, the defendant cannot bring money into court ^r; though he may move to stay the proceedings, on payment of the whole debt and costs ^s: but

^e Barnes, 339. 359.

^f 1 Vent. 356. 2 Salk. 596, 7.

^g 2 Salk. 596. 1 Wils. 75.

^h 2 Bur. 1120. Barnes, 284.

ⁱ 8 Mod. 305.

^j 2 Salk. 596, 7.

^k Barnes, 280. 282. Pr. Reg. 257.

^l Bunb. 124.

^m Cas. temp. Hardw. 173.

ⁿ 2 Str. 890.

^o Cro. Jac. 128. 498. 629.

^p 3 Mod. 41.

^q 5 Mod. 212.

^r 1 H. Blac. 249.

^s 2 Str. 890. Barnes, 285.

^t Ante, 483.

but in the latter, the defendant has been allowed to bring money into court^t; because the plaintiff does not recover according to his demand, but according to the verdict of the jury. And the defendant, by act of parliament^u, may bring money into court, in *debt*, *covenant*, or other action on a policy of assurance.

In an action for *general* damages, upon a contract^v, or for a tort^w or trespass^x, as a tender cannot be pleaded, so the defendant is not allowed to bring money into court. But in an action of *assumpsit* against a carrier, for not delivering goods, the defendant having advertised that he would not be answerable for any goods beyond the value of twenty pounds, unless they were entered and paid for accordingly, the court allowed him to bring the twenty pounds into court^y. And where, in an action for general damages, the bringing of money into court is irregular, if the plaintiff take it out, he thereby waives the irregularity, and cannot afterwards have a verdict, unless he recover more than the sum brought in^z.

In

^t 1 Vent. 356. 2 Salk. 596, 7. may be brought into court, in an action on the *case* for navigation-calls. 7 T. R. 36.

^u Stat. 19 Geo. II. c. 37. § 7. 3 Bur. 1773. ^x 2 Wils. 115.

^v 1 Vent. 356. 2 Blac. Rep. 877. 2 Bos. & Pul. 234. 3 Bos. & Pul. 14. ^y *Hutton v. Bolton*, E. 22 Geo. III. 1 H. Blac. 299. *in notis*; but see 2 Bos. & Pul. 234.

^w 2 Str. 787. 906. 2 Barnard. K. B. 4. S. C. 7 T. R. 335. 8 T. R. 47.; but money ^z 1 T. R. 710.

In an action by an executor or administrator, the plaintiff not being liable to costs, the defendant was not formerly allowed to bring money into court,^a but now it is otherwise^b; and the effect of the rule will be, not to make the plaintiff pay, but only to lose his subsequent costs. And in actions against justices of the peace^c, or officers of the excise^d or customs^e, for any thing done in the execution of their offices, “in case the defendants shall
 “ have neglected to tender any, or shall have tendered insufficient amends, before the action
 “ brought, they may by leave of the court, at any
 “ time before issue joined, pay into court such
 “ sum of money as they shall see fit; whereupon
 “ such proceedings, orders, and judgments shall
 “ be had, made, and given, in and by such court,
 “ as in other actions where the defendant is allowed to pay money into court^f.”

Where there are several counts or breaches in the declaration, and as to some of them the defendant

^a 2 Salk. 596.

^b 2 Str. 796.

^c Stat. 24 Geo. II. c. 44. § 4.

And note, this seems to have been the first statute, which allows money to be brought into court, in an action for general damages.

^d Stat. 23 Geo. III. c. 70.

^e Stat. 24 Geo. III. Sess.

2. c. 47. § 35.

^f See also the statutes 13 G. III. c. 78. § 79. and 13 G. III. c. 84. § 81. as to bringing money into court, by persons acting under the general *highway* and *turnpike* acts.

ant may bring money into court, but not as to the others, he may obtain a rule for bringing it in specially, upon some of the counts or breaches only. Thus, where an action of *covenant*^g was brought upon a lease, for non-payment of rent, and not repairing, &c. the court made a rule, that upon payment of what should appear to be due for rent, the proceedings as to that should be stayed; and as to the other breaches, that the plaintiff might proceed as he should think fit. So, in *covenant* upon a charter-party^h, the defendant was allowed to bring money into court, upon two of the breaches only; viz. for freight and demurrage. If a defendant bring money into court, upon some of the counts, and the plaintiff take it out, the latter is only entitled to the costs of those countsⁱ.

The motion for leave to bring money into court is a motion of course, and should regularly be made before plea pleaded^j; but it is frequently made^l, and in some cases expressly authorised^m, *after* plea, on obtaining a judge's order for that purpose: and if there has been no delayⁿ, the court will give the defendant leave to withdraw the
general-

^g 2 Salk. 596. 1 Wils. 75. is paid in on a side-bar rule.
^h Barnes, 350. 1 Vent. 356. ^k 1 Ld. Raym. 398. 1 Wils.
contra; and see Pr. Reg. C. 157. Barnes, 279.
ⁱ 1 T. R. 711.
^j 2 Bur. 1120. ^m Stat. 24 Geo. II. c. 44. §
^l 4 T. R. 579. 4.
ⁿ 2 Str. 1271. Barnes, 289
 when the sum is under £5. it 362.

general-issue, in order to bring money into court, and replead it, on payment of costs. The motion-paper being signed by counsel, the money should be paid to the signer of the writs, who acts in this instance as deputy to the master^o; and will give a receipt for the money, on being paid 20s. for every 100*l.* and so in proportion for every greater or lesser sum exceeding 10*l.* and 2*s.* for every sum under 10*l.* besides 2*s.* 4*d.* for the receipt^p. On a plea of *tender*, with a *profert in curiâ*, the sum tendered must be paid to the signer of the writs, who will give a receipt for it in the margin of the plea; and if not so paid, the plaintiff may consider the plea as a nullity, and sign judgment^q. If the defendant bring money into court on a plea of tender, the plaintiff may take it out, though he reply that the tender was not made before action brought^r.

The rule to bring money into court is drawn up by the clerk of the rules in term-time, or within a week after, on the motion-paper and receipt being left with him as instructions; but after a week from the end of the term, there must be a judge's order for drawing up the rule, which is granted of course, without a summons. And the rule is commonly drawn up with costs, to be taxed by the master. But where the plaintiff's conduct appeared to be
oppressive,

^o 1 Crompt. 148.^q 1 Str. 638.^p R. H. 5 Jac. I.^r 1 Bos. & Pul. 332

oppressive, the court on motion discharged so much of the rule, for bringing money into court, as related to the payment of costs^s: And where the defendant, after action brought and before declaration, has tendered the sum which he afterwards brings into court, and offered to pay costs up to that time, it seems but reasonable that he should not be liable to the payment of any further costs. A copy of the rule is usually annexed to the plea, or otherwise served on the plaintiff's attorney.

Bringing money into court is an acknowledgment of the right of action, to the amount of the sum brought in^t; and therefore the plaintiff, on producing an office-copy of the rule, is entitled to receive it at all events, whether he proceed in the action or not, and even though he be non-suited^u,
or

^s 1 Bur. 578.

^t 5 Bur. 2640. 2 T. R. 275.

^u It has been doubted, whether the plaintiff can be *nonsuited*, after bringing money into court; but there seems to be little reason for such a doubt. When money is brought into court, unless the plaintiff will accept of it with costs, in discharge of the suit, it is considered as paid before action brought, and struck out of the declaration; and the action proceeds for

the residue of the demand, in like manner as if it had been originally commenced for that only. 3 T. R. 657. And accordingly, the practice of nonsuiting the plaintiff, after money paid into court, appears to be supported by many authorities. See 2 Salk. 597. Pr. Reg. 250. Cas. Pr. C. P. 36. S. C. Cas. *temph.* Hardw. 206. 2 Str. 1027. S. C. 4 T. R. 10. 7 T. R. 372. 2 Esp. Cas. *Nl. Pri.* 481. 607. 2 H. Blac. 374. It seems therefore,

or have a verdict against him ^v: And being an acknowledgment on record, the party can never recover it back again, though it afterwards appear that he paid it wrongfully ^w. But bringing money into court is an admission of a legal demand only ^x. And beyond the amount of the sum brought in, it is no acknowledgment of the right action ^y; and therefore if the plaintiff proceed further, it is at his peril. Where the declaration contains a count on a special contract, bringing money into court *generally*, is an admission of the contract, so as to supersede the necessity of proving it at the trial ^z: therefore in such case, if the defendant mean to deny the existence of the contract, he should pay money into court *specially*, on the other counts of the declaration.

When money is brought into court, the plaintiff either accepts of it with costs, in discharge of the

<p>fore, that after payment of money into court, there may be a nonsuit, a judgment as in case of a nonsuit, a demurrer to evidence, a plea <i>fruits darrien continuance</i>; in short, that the cause goes on substantially in the same manner, as if the money had not been paid in at all. 2 H. Blac. 375. <i>per Eyre</i>, Ch. Just.</p> <p>^v 2 Salk. 597. 2 Str. 1027. <i>Cas. temp. Hardw.</i> 206 S. C.</p>	<p>Pr. Reg. 250. Cas. Pr. C. P. 36. S. C.</p> <p>^w 2 T. R. 645.</p> <p>^x 1 Bos. & Pul. 264.</p> <p>^y 1 T. R. 464. and see 3 T. R. 657. 4 T. R. 579.</p> <p>^z 2 T. R. 275. 4 T. R. 579. 5 T. R. 575. Peake, Cas. <i>M. Pri.</i> 14. 1 Esp. Cas. <i>M. Pri.</i> 347. 2 East, 128. 2 H. Blac. 374. <i>Bryan v. Williamson</i>, M. 38 G. III. C. P. 2 Bos. & Pul. 550</p>
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the suit, or proceeds in the action: In the former case, he should take an office copy of the rule, and procure an appointment thereon from the master to tax the costs, and serve the same on the defendant's attorney; or in default thereof, it will be considered that the plaintiff intends to proceed in the action, to recover a larger sum than that paid into court^a. The costs being taxed and demanded, the plaintiff, if they are not paid, must proceed in the action, and cannot have an attachment^b; for the rule in this court is conditional, and not, as in the Common Pleas^c, obligatory upon the defendant to pay the costs.

If the plaintiff proceed in the action, the sum brought into court is, by the terms of the rule, to be struck out of the declaration, and paid out of court to the plaintiff or his attorney; and upon the trial of the issue, the plaintiff shall not be permitted to give evidence for the same: In such case, if the plaintiff proceed to trial^d, otherwise than for the non-payment of costs, and do not prove more to be due to him, than the sum brought in, the plaintiff, on the rule being produced,

^a R. M. 31 G. III. 4 T. ^d 2 Salk. 597. 2 Str. 1027.
R. 12. Cas. temp. Hardw. 206. S. C.

^b 2 Str. 1220. 7 T. R. 6. Say. Rep. 196, 7. 2 Bur.

^c Barnes, 283. Pr. Reg. 1121.
259. S. C.

duced^e, shall be nonsuited^f, or have a verdict against him^g, and pay costs to the defendant^h: But if more appear to be due to him, he shall have a verdict for the overplus, and costsⁱ. Where the plaintiff proceeds further, without going on to trial, he shall have his costs, to the time of bringing money into court; and the defendant shall be allowed his subsequent costs^k. And the plaintiff is entitled to costs, up to the time of bringing money into court, though he afterwards give notice of trial, which he neglects to countermand, whereby the defendant is entitled to judgment as in case of a nonsuit^l; or though the plaintiff afterwards enter the record for trial, and withdraw it^m.

After the defendant had brought money into court, the plaintiff proceeded to trial, and a juror being withdrawn by consent, it was held that the plaintiff was not entitled to costs, up to the time of bringing the money into courtⁿ. And where the defendants in several actions on a policy of assurance,

^e 5 Com. Dig. 20. and see Willes, 485.

^f *Qu.* Whether a plaintiff having taken money out of court after being nonsuited, and never having moved to set the nonsuit aside, is barred from bringing a new action. 3 Esp. Cas. *Ni. Pri.* 106.

^g Cas. *temp.* Hardw. 260.

^h 4 T. R. 10. but see 1 T. R. 710. 2 Bos. & Pul. 56. *contra*.

ⁱ Cas. *temp.* Hardw. 260.

^k 1 T. R. 629. Willes, 191. Barnes, 282. Prac. Reg. 255. S. C. but see Say. Rep. 196. *contra*.

^l 8 T. R. 408.

^m *Id.* 486.

ⁿ 3 T. R. 657.

assurance, paid money into court, which the plaintiff took out, without taxing the costs at that time; and afterwards they entered into the common consolidation-rule; and the plaintiff was nonsuited, in the action that was tried; the court, we have seen °, held that the latter was not entitled to the costs in any of the actions, up to the time of paying money into court.

° *Ante*, 558.

CHAP-

CHAPTER XXVII.

Of PLEAS to the JURISDICTION, CLAIMING CONUSANCE, and PLEAS in ABATEMENT.

- THE general Order of Pleading is,
1. *To the Jurisdiction of the Court.*
 2. *To the Person,*
 1. *Of the Plaintiff:*
 2. *Of the Defendant.*
 3. *To the Count.*
 4. *To the Writ; and herein,*
 1. *To the Form:*
 2. *To the Action of the Writ.*
 5. *To the Action itself, in bar thereof*^a.

By this order of pleading, each subsequent plea admits the former: As when the defendant pleads to the person, he admits the jurisdiction of the court; when he pleads to the count, he admits the competency of the plaintiff, and his own responsibility; when he pleads to the form of the writ, he admits the form of the count^b; and in like manner of the rest.

Pleas

^a Co. Lit. 303. Latch, 178.
Gilb. C. P. 49.

^b Gilb. C. P. 50

Pleas to the jurisdiction of the court are either in *local* or *transitory* actions. In *local* actions, it is a good plea to say that the lands are ancient-demesne, holden of the king's manor^c; or that the cause of action arose in *Wales*^d, or beyond the sea^e, or in a county-palatine^f, cinque-port^g, or other *exempt* jurisdiction^h. In *ejectment*, the tenants in possession cannot plead to the jurisdiction, without leave of the courtⁱ: and where ancient-demesne is pleaded, there must be an affidavit, stating that the lands are holden of a manor, which is ancient-demesne; that there is a court of ancient-demesne, regularly holden; and that the lessor of the plaintiff has a freehold interest^k.

In *transitory* actions, it is said^l, the defendant cannot plead to the jurisdiction of the court, unless the plaintiff by his declaration shew, that the

^c Herne, 7. 351. Rastal, 101. Keilw. 88, &c. S. C. 3 Inst. Hans. 103. Thomp. 2. 3 Inst. Cl. 7. but see Yelv. 12, 13. Cl. 8, 9. 1 Salk. 56. 2 Ld. Carth. 109.

Raym. 1418. This plea must be pleaded within the first 52. 1 Blac. Rep. 197.

four days of the term. 8 T. R. 474. ⁱ 1 Barnard. K. B. 7. 352. 365. Andr. 368. 2 Str. 1120.

^d 1 Wils. 193. 1 Blac. Rep. 197. 3 Wils. 51.

^e 1 Salk. 80. 1 Show. 191. ^k 2 Bur. 1046.

S. C. ^l 4 Inst. 212, 213. 1 Sid.

^f Rastal, 419. Herne, 7. 103. Carth. 109. Gilb. C. P. 3 Inst. Cl. 14. 191. 1 Bac. Abr. 560. and see

^g 4 Inst. 224. Jenk. 190. 3 East, 128.

the cause of action accrued within a county-palatine: And even then, it must be averred in the plea, either that the defendant dwells in the county-palatine, or that he hath sufficient goods and chattels there, by which he may be attached; otherwise the plea cannot be allowed, lest a failure of justice should ensue^m: and the defendant cannot in such case demur to the declarationⁿ, or move in arrest of judgment^o.



Of a nature very similar to pleading to the jurisdiction of the court, is claiming *Conusance*^p; or praying that the cause may be determined before an inferior jurisdiction: concerning which, it will be proper to consider, the several sorts of inferior jurisdictions; in what cases conusance may be claimed; and the time and manner of claiming it.

There are three sorts of inferior jurisdictions^q. The first is to *hold pleas*, which is merely a concurrent jurisdiction; and can neither be claimed nor pleaded. The second is a *general conusance* of pleas;

^m Carth. 355.

^q Palm. 456. Hardr. 509.

ⁿ *Id.* 354. 5 Mod. 144. S. C. 2 Ld. Raym. 836. 1 Salk. 148.

^o Carth. 11. Comb. 30. 48. 3 Salk. 79. 12 Mod. 643. S. C.

S. C. and see Comb. 115. *Id.* 666. 10 Mod. 126. Vin

^p Gilb. C. P. 191. 1 Bac. Abr. tit. *Conusance*. 589

Abr 560. 1 Rol. Abr. 489

pleas; which, being intended for the benefit of the lord, may be claimed by him, though it cannot be pleaded by the defendant. The third is a *conusance* of pleas, with *exclusive* words; as where the king grants to a city, that the inhabitants shall be sued within the city, *and not elsewhere*: This being an *exempt* jurisdiction, may be either claimed or pleaded^r. Hence it is a general rule, that wherever the defendant can plead to the jurisdiction of the court, there the lord of the franchise may claim conusance, but not *vice versâ*^s.

The privilege of claiming conusance is confined to courts of record^t, and *local* actions^u; except where the defendant is a member of the University of *Oxford* or *Cambridge*^v. And it is also confined to such actions as were in *esse* at the time of the grant^w, and does not extend to those created since, by act of parliament; except where a common-law action is given against a person by another name, as *debt* against an administrator^x. Neither shall this privilege be allowed, where the franchise cannot give a remedy^y, and there would consequently be a failure of justice^z: as in reple-

viii.

^r Bro. Abr. tit. *Conusance*, Abr. 560.

52. 1 Blac. Rep. 197.

^w 14 Hen. IV. 20. b

^s Gilb. C. P. 193.

^x *Id.* 22 Ed. IV. 22.

^t 2 Inst. 140.

^y 2 Vent. 363.

^u 4 Inst. 213. 1 Sid. 103.

^z Hardr. 507

^v Gilb. C. P. 193. 1 Bac.

vin^a, *quare impedit*^b, waste, &c. or where the lord is a party, and the plea is to be holden before himself^c, or the defendant is a stranger, who hath nothing within the franchise^d; or lastly, where the plaintiff is a privileged person, as an attorney or officer of the court^e. But conusance may be claimed by a defendant, in custody of the marshal^f.

Conusance of pleas must be claimed after appearance^g, and before imparlance^h, in the first instance, or on the very first day the party hath in court; even upon the return-day of the writ, if the cause of action appear therein: if not, then upon the first day given upon the declarationⁱ. As for instance, in *trespass* by original, where place is named, or *præcipe quod reddat*, where land is demanded, conusance must be claimed on the return-day of the writ; because in these cases, the writ states where the cause of action arises^k. But in *debt* or *detinue* 'tis otherwise: for
it

^a 2 Inst. 140.

^b Dalis. 12.

^c 8 Hen. VI. 18, 19, 20,
21. Hob. 87.

^d 22 Ass. 83. 1 Rol. Abr.
493.

^e 3 Leon. 149. Lit. Rep.
304. Willes, 233. Barnes, 346.
Prac. Reg. 696. Vin. Abr.
tit. *Conusance*, 590. S. C. *Id.*
592. Bendl. 233. *cont.*

^f Bro. Abr. tit. *Conusance*,

50. 1 Salk. 2. Gilb. C. P. 195.

^g Comb. 319.

^h 1 Sid. 103. 1 Show. 352.
10 Mod. 125. Willes, 233.

Barnes, 346. Prac. Reg. 696.
Vin. Abr. tit. *Conusance*, 590:
S. C. *Id.* 592. 1 Barnard.
K. B. 66. 2 Wils. 411. Gilb.
C. P. 196.

ⁱ 2 Wils. 413.

^k 5 Bur. 2823.

it does not appear, till the plaintiff has counted, where the contract or obligation was made; and therefore till then, the lord need not make his claim¹. So in *replevin*, the place where the cattle were taken does not appear, till the plaintiff has counted, if it be between strangers: but if a *replevin* be sued against the lord of the franchise himself, there the lord's claim would come too late after the count; because the law intends, that he knew the place of taking, being himself a party, and so, by not demanding his privilege on the writ, he gives the court seisin of the cause: For the lord must use no delay^m.

As to the manner of making the claim, it is holden, that conusance may be claimed by the lord of the franchise in person, or by his bailiff or attorneyⁿ: If it be claimed by attorney, the warrant of attorney must be produced in court, and filed^o. The grant of conusance must also be produced^p, or an exemplification of it under the great seal^q; and if the grant was before time of memory, an allowance must be shewn in the King's Bench, or before justices in *Eyre*^r.

Upon

¹ 10 Mod. 127.

454.

^m 5 Bur. 2823.

^q 5 Bur. 2820.

ⁿ Bro. Abr. tit. *Conusance*,
50. 12 Mod. 644. 666.

^r Keilw. 189, 190. 1 Sid.
103. 1 Salk. 183. 1 Ld. Raym.

^o Palm. 456. 1 Sid. 103.

427, 8. 475. S. C. Gilb. C. P.

^p 1 Lev. 89.

195. but see Bro. Abr. tit

^p 12 Mod. 644. 1 Blac. Rep.

Conusance, 51.

Upon a claim made by the University of *Oxford* or *Cambridge*^s, there must be likewise, in addition to the grant, an exemplification of the statute confirming it^t; together with an affidavit of the defendant's residence^u. The claim itself must be entered upon a roll^v; and after stating the several proceedings that have been had in the cause, must set forth the grounds upon which it is made, with great precision^w. It may be demurred to; or the facts therein alleged may be controverted by pleading^x. If allowed, a day is given, upon the roll, for the lord of the franchise to hold his court; and the parties are commanded to be there on that day^y. But the record still remains in the court above; and a transcript only is sent down to the court below^z: so that if justice be not done there, as if the defendant be a stranger, and has nothing within the franchise by which he can be summoned, or if the judge misbehave himself, &c. the plaintiff shall have a re-summons^a, upon the record in the court above. And if a re-summons issue, upon failure of right
in

^s 10 Mod. 126. 1 Blac. Rep. 454.

^t 13 Eliz. c. 29.

^u 1 Barnard. K. B. 49. 65. 2 Str. 810. 2 Wils. 311. 1 Blac. Rep. 454. 5 Bur. 2820.

^v Comb. 319. 1 Barnard. K. B. 65. 2 Str. 810.

^w 2 Wils. 409, 10.

^x *Id.* Comb. 319.

^y 2 Ld. Raym. 836, 7. 12

Mod. 644. 3 Salk. 79. S. C.

^z *Id.* Jenk. 31.

^a *Id.* Hardr. 407. but see Vin. Abr. tit. *Conusance*, 589 10 Mod. 127.

in a franchise, the lord of the franchise shall never afterwards have conusance of that plea ^b.



Pleas in abatement to the person of the *plaintiff*, are either that he is not in existence, (being only a fictitious person ^c, or dead ^d,) or else that being in existence, he is an alien-enemy ^e, attainted of treason or felony ^f, outlawed upon mesne or final process ^g, under a *præmunire* ^h, excommunicated ⁱ, or convicted of popish recusancy ^k. Where the cause of action is forfeited, as by the plaintiff's being an alien-enemy ^l, attainted ^m, or outlawed for felony ⁿ, there his disability may be pleaded in abatement or in bar; but otherwise it can only be pleaded in abatement.

Pleas in abatement to the person of the *defendant* are, that he is privileged, as an attorney or officer of the court ^o; under the king's protection ^p; or an infant ^q, when sued as heir on the obligation of

^b Jenk. 34.

^c Ast. Ent. 10. 3 Inst. Cl. 89.

^d Ast. Ent. 8. 3 Inst. Cl. 75, &c.

^e Lutw. 34. 3 Inst. Cl. 16.
Alien-enemy is a good plea in bar to the action. 6 T. R. 23. 35.

^f Carth. 137, 8.

^g Lutw. 6. 1529. 3 Inst. Cl. 23, &c. 1 East, 634.

^h Co. Lit. 129. b.

ⁱ Lutw. 17. 3 Inst. Cl. 18.

^k 3 Inst. Cl. 20. 1 Str. 520.

^l Co. Lit. 129. b.

^m Bro. V. M. 252.

ⁿ Co. Lit. 128. b. Gilb. C. P. 200.

^o 1 Lutw. 639.

^p 2 Bro. Ent. 106.

^q Rastal, 360. 362. 379 Bro. R. 195.

of his ancestor, &c.; in which latter case, the *parol* shall demur, or proceedings be stayed, till he come of age.

Under the head of pleas to the person, may also be included *Coverture*, in the plaintiff^r or defendant^s; or that the plaintiffs or defendants, suing or being sued as husband and wife, are not married^t; or any other plea for want of proper parties, as that there is an executor^u, administrator^v, or other person^w, not named, who ought to be made a co-plaintiff or co-defendant. We have already seen, that if an action be brought for a tort, by one of several joint-tenants or tenants in common^x, or against one of several partners, upon a joint contract^y, the defendant must plead in abatement, and cannot otherwise take advantage of the objection. It should also be observed, that if an action be brought against a carrier in *case*, on the custom of the realm, for not safely carrying goods,

- ^r Ast. Ent. 9. 3 Inst. Cl. 70. If the plaintiff take husband, after suing out the writ, and before the declaration, the defendant cannot give the coverture in evidence under the general issue, but must plead it in abatement. 6 T. R. 265.
- ^s 1 Lutw. 23. 3 Inst. Cl. 71.
- ^t 3 Inst. Cl. 69.
- ^u *Id.* 51. Rastal, 325. a.
- ^v 3 Inst. Cl. 53. Rastal, 324.
- ^w 3 Inst. Cl. 53. 119. 1 Lutw. 696. and see 1 East, 634.
- ^x *Ante*, 9. And see 1 Salk. 32. 290. 2 Str. 820.
- ^y *Ante*, 8. But see 2 Mod. 279. 3 Mod. 321. 2 Salk. 440. Show. 29. 101. 3 Lev. 258. Carth. 58. S. C. Gilb. Evid. 189.

goods, the defendant may plead in abatement, that his partners ought also to have been sued^z: Or if an action of debt be brought on the statute 9 Ann. c. 14. to recover back money won at play, he may plead in abatement, that the money was due from others not named, as well as from himself^a. In a plea in abatement, that another person ought to have been sued with the defendant, it is not necessary to lay a venue: And if it be pleaded that such other person is alive, to wit, in *Spain*, it will be considered as pleaded without any venue^b.

Pleas in abatement of the *count* can only be pleaded in actions by original writ; and are for some uncertainty, repugnancy, or want of form^c, not appearing on the face of the writ, or else for some variance therefrom^d.

Pleas in abatement of the *writ* are, either for matter apparent on the face of it, or for matter *dehors*^e, existing at the time of suing out the writ, or arising afterwards^f. To the *form* of the writ they are, for some apparent uncertainty, repugnancy, or want of form^g; *variance*^h from the record,

^z 6 T. R. 369. *sed vide ante*, 9.

^a 7 T. R. 257.

^b *Id.* 243. *Ante*, 372. (r).

^c 3 Inst. Cl. 62.

^d Reg. Pl. 277, 8.

^e Gilb. C. P. 51.

^f See Com. Dig. tit. *Abatement*, (H).

^g Lutw. 25. 3 Inst. Cl. 49. 54. 66, &c.

^h 3 Inst. Cl. 43, &c.

record, specialty, &c.; *misnomer*ⁱ of the plaintiff or defendant^k; or, in actions by original-writ, the omission or mistake of the defendant's *addition*^l, that is, of his estate, degree, mystery, or place of abode. But the plaintiff may sue the defendant, either

ⁱ Lutw. 10. Ast. Ent. 1. 3 Inst. Cl. 79, &c. *Ante*, 402, 3. The consequences of a *misnomer* of the defendant seem to be, first, that in bailable process, if the defendant be not called and known by the name in the process, as well as by his right name, the sheriff and his officers are liable to an action of trespass and false imprisonment, for arresting him. 6 T. R. 234. and secondly, that if the plaintiff declare against him by a wrong name, the defendant, if he be not estopped, may plead the misnomer in abatement; and it seems that his entering into a bail-bond to the sheriff, in the wrong name, would not estop him from pleading in abatement in the original action; though perhaps it might, in an action on the bail-bond. Willes, 461. Barnes, 94. S. C. and see 1 Salk. 7. The safer way however, is for the defendant, where he is arrested by a wrong name, to enter into the bail-bond by his

right name, stating that he was arrested by the name in the writ; for if his entering into it by a wrong name would not operate as an estoppel, it might be evidence by his own admission, of his being called as well by one name as the other. The court, we have seen, will not order the bail-bond to be delivered up to be cancelled, on the ground of a misnomer: *ante*, 249. And it is clear, that if the defendant, after being arrested, were to put in bail above in a wrong name, it would estop him from pleading the misnomer in abatement. Willes, 461. Barnes, 94. S. C. and see 1 Salk. 8. 3 T. R. 611. The bail above therefore, in such case, should be put in, and entered on the recognisance roll, by the defendant in his right name, as having been arrested by the name in the writ.

^k Append. Chap. XXVII. § 1.

^l Stat. 1 Hen. V. c. 5. 3 Inst. Cl. 92.

either by the addition of his degree or mystery^m; and may name him of the place where he *lately* dweltⁿ. A writ in *debt* may be abated in part, and stand good for the remainder: And if a plea in abatement contain matter which goes in part abatement of the writ only, but conclude with a prayer that the whole writ may be abated, the court may abate so much of the writ as the matter pleaded applies to^o.

Pleas in abatement to the *action* of the writ are, that the action is misconceived^p; or was prematurely brought, before the cause of it arose^q; or that there is another action depending for the same cause^r. It is said, in one case^s, that the pendency of a prior action for the same cause may be pleaded in bar to a second action; but it cannot be pleaded in abatement. This however must be understood with reference to the particular case of a *qui tam* action, and not as a general rule applicable to all cases.

The general requisites of a plea in abatement are, that it should be certain to every intent^t, give the plaintiff a better writ^u, and have an apt and proper beginning and conclusion: For it is the

^m 8 Mod. 51, 52. 1 Str. 56. Fortes. 334.

556. 2 Str. 816. 2 Ld. Raym. ^r Lutw. 33. 3 Inst. Cl. 1541. S. C. 111.

ⁿ 2 Str. 924.

^s Say. Rep. 216.

^o 2 Bos. & Pul. 420.

^t Co. Lit. 303. a. Cro. Jac.

^p 3 Inst. Cl. 120, &c.

82. 3 *id.* 67.

^q Lutw. 8. 13. 3 Inst. Cl.

^u Brownl. 139.

the beginning and conclusion that make the plea ^v. Pleas to the jurisdiction of the court, or in abatement, cannot be pleaded after making a *full* defence: the former must be pleaded *in person*, but the latter may be pleaded *by attorney*. And they are both usually begun, by defending *the wrong* (or *force*) *and injury, when, &c.* which is considered only as making *half* defence ^x: for the *&c.* implies only *half* defence, in cases where such defence is to be made, but will be understood as a *full* defence, if that be necessary ^y. Where the defendant pleads to the writ, for matter *apparent*, he should begin his plea, by praying judgment of the writ, and conclude it in the same manner ^z; but where the plea is for matter *dehors*, as joint-tenancy, non-tenure, or the like, there he should conclude it only in this manner ^a. A plea of misnomer of the defendant is bad, which begins thus: “ And *the said Richard*, sued by the name of *Robert*, &c.^b.” or thus: “ And *he* against whom
the

^v 1 Sid. 189. 1 Vent. 136. G. II. C. P. *Thompson v. Stockdale*, H. 23 G. III. K. B. 8 T. S. C. 1 Ld. Raym. 593. 1 R. 631. 3 Bos. & Pul. 9 (a). Salk. 210. S. C. 12 Mod. 525. ^y 8 T. R. 633. 3 Bos. & 10 Mod. 112. 192. 210. Willes, Pul. 9 (a). 479. ^z Moor. 30. Dalis. 33. S. C.

^w Gilb. C. P. 187.

Reg. Pl. 273. Lutw. 11. 12

^x Lit. § 195. Co. Lit. 127.

Mod. 525.

^b Hardr. 365. 1 Lutw. 7.

^a Same cases.

Willes, 40. Gilb. C. P. 188.

^b 5 T. R. 487

Wheatley v. Cudmerson, M. 15

the plaintiff hath exhibited his bill, by the name of J. S. &c. ^c." In pleading to the jurisdiction, the defendant should conclude his plea by praying judgment, *if the court will take further cognizance of the suit* ^d. In pleading to the person, the conclusion is, *whether the defendant ought to answer, or the plaintiff to be answered* ^e; or if excommunication, or other temporary disability, be pleaded, *that the plaint may remain without day, until, &c.* ^f. In pleading to the writ or count, if the action be by *original*, the plea should conclude, by praying judgment *of the writ or count, and that the same may be quashed* ^g. But if the action be by *bill*, the plea should conclude, by praying judgment *of the bill, or of the bill and declaration*, (for they are the same thing,) and not of the *declaration* only ^h. A plea of misnomer, praying *if* the bill, and that the same may be quashed, is ill on special demurrer ⁱ.

Pleas to the jurisdiction of the court ^k, and in abatement,

^c 8 T. R. 515.

^d Latch, 78.

^e *Id. ibid.* Lit. § 195, &c.

^f 3 Lev. 240. Lutw. 19. 3 Inst. Cl. 81. 1 Str. 521.

^g 5 Mod. 132.

^h *Id.* 5 Mod. 144. 12 Mod. 133. S. C. 10 Mod. 192. 210.

ⁱ 3 T. R. 185.

^k Dyer, 210. b. *in margine.*

T. Raym. 34. 1 Keb. 137.

S. C. Gilb. K. B. 317. 344.

Gilb. C. P. 183, 184. 187.

4 Bac. Abr. 28, 9. 8 T. R. 474. but see Dyer, 210. b.

in margine. Doc. Plac. 234.

Latch, 83, Cro. Car. 9. Sty.

Rep. 90. Willes, 239. Vin.

Abr. tit. *Conusance*, p. 591.

as to the plea of ancient de-

mesne.

abatement^l, ought to be pleaded before a *general* imparlance; and they must be pleaded within four days *inclusive*^m after the delivery, or filing and notice, of the declarationⁿ; unless the declaration be delivered or filed after term, or so late in the term, that the defendant is not bound to plead to it that term; in both which cases, the defendant may, within the first four days *inclusive* of the next term, plead to the jurisdiction of the court, or in abatement, as of the preceding term^o. If such a plea be pleaded^l after a *general* imparlance, the plaintiff, we have seen^p, may either sign judgment, or apply to the court by motion to set it aside; or he may demur thereto, or allege the imparlance in his replication, by way of estoppel. And if it be not delivered, or left in the office, in due time, it is not to be received, whether a rule to

^l 2 Keb. 143. 1 Mod. 14. 286. Cas. Pr. C. P. 63. S. C.
 1 Vent. 184. 1 Lutw. 23. But see Sty. P. R. 458. 468.
 Sty. P. R. 465. Gilb. K. B. R. E. 5 Ann. (a). 1 T. R.
 344. R. E. 5 Ann. (a). R. T. 278, 9. from whence it should
 5 & 6 Geo. II. (b). 1 Str. 523. seem, that they ought to be
 4 T. R. 520. 6 T. R. 369. pleaded, before the rule for
 7 T. R. 447. (d). Barnes, 224. pleading is expired.
 234.

^o 1 Salk. 367. Gilb. K. B.
^m 1 T. R. 277. 5 T. R. 344, 5.
 2110.

ⁿ 11 Mod. 2. 2 Str. 1192. ^p *Ante*, 419. But it there
 1 Wils. 23. S. C. 2 Str. appears, that after a *special*
 1268. 1 T. R. 277. 689. imparlance, the defendant may
 7 T. R. 298. And see Gilb. plead in abatement, though
 C. P. 52. Pr. Reg. 3. Cas. not to the jurisdiction of the
 Pr. C. P. 23. S. C. Pr. Reg. court.

to plead be given or not^a. And *Sunday*, or any other day on which the court does not sit, is to be accounted as one of the four days, unless it happen to be the last^r. It is a general rule, that if the defendant plead before the bail are perfected, his plea will be considered as a nullity, although the bail afterwards justify^s. But in a country cause, if the defendant put in special bail in time, he may plead in abatement, though the bail be not perfected till after the four days, if they be ultimately perfected within the time allowed by the practice of the court^t.

Before the statute for the amendment of the law, where the defendant pleaded a *foreign* plea, he was obliged to verify it by affidavit^u. And now, by that statute^v, “no *dilatory* plea shall be “received in any court of record, unless the party “offering such plea do, by affidavit, prove the “truth thereof; or shew some probable matter “to the court, to induce them to believe that the “fact of such dilatory plea is true.”^w The affidavit required by this statute, may be made by the

^a 1 Lil. P. R. 3. R. E. Rep. 435. 1 Saund. 98.
⁵ Ann. (a). 1 T. R. 278, 9. Carth. 402. 5 Mod. 335.
⁷ T. R. 298. S. C.

^r R. E. 5 Ann. (a). 1 T. R. ^v 4 & 5 Ann. c. 16. § 11.
 210.

^s *Ante*, 423.

^t 2 East, 406.

^u 2 Lil. P. R. 299. Sty. 2 Bos. & Pul. 384.

^w *Aid-prayer* is a *dilatory* plea, within this statute, and must be verified by affidavit.

the defendant himself, or by a third person ^x; and as the statute only requires probable cause, there does not seem to be any necessity for an affidavit, where the plea is for matter apparent, as want of addition ^y, &c. Yet where the defendant pleaded, after oyer of the original, that it was not returned, the court set aside the plea, for want of an affidavit of the truth of it ^z.

A plea in abatement should be signed by counsel; and filed in the office of the clerk of the papers, with an affidavit that the plea thereto annexed is true, in substance and matter of fact ^a. And if the plea be not filed in due time, or if there be no affidavit annexed of the truth of it, the plaintiff may consider it as a nullity, and sign judgment ^b; or the plaintiff may move the court to set it aside ^c.

When a plea in abatement is regularly put in, the plaintiff must reply to it, or demur. If he reply, and an issue *in fact* be thereupon joined, and found for him, the judgment is *peremptory, quod recuperet* ^d; but if there be judgment for the plaintiff,

^x Pr. Reg. 6. Barnes, 344.
S. C.

^y Pr. Reg. 5.

^z 1 Str. 639. 2 Ld. Raym.
1409, S. C.

^a 2 Str. 705. 738. and see
Append. Chap. XXVII. § 2.

^b 1 T. R. 277. 689. 5 T.
R. 210. 7 T. R. 298.

^c 1 Str. 638. Say. Rep.
19. 293. 3 Bur. 1617.

^d Gilb. C. P. 53. 1 Ld.
Raym. 594. 2 Ld. Raym.
1022. 1 Str. 532. 2 Wils.

367. 1 East, 542. 2 Bos.
& Pul. 389. but see 1 East,

tiff, on *demurrer* to a plea in abatement, or replication to such plea, the judgment is only *interlocutory*, *quod respondeat ouster*^e: In the latter case, the defendant has in general four days time to plead; but this is in the discretion of the court^f: and they will sometimes order him to plead *instantly*, or on the morrow. After a judgment of *respondeat ouster*, it is said, there can be no plea in abatement; for if it were allowed, there would be no end of such pleas^g: But this must be understood of pleas in abatement *in the same degree*, as popish recusancy and outlawry^h, being both to the person; for the defendant may plead to the person of the plaintiff, and if that be over-ruled, he may afterwards plead to the form of the writⁱ.

The judgment for the *defendant*, on a plea in abatement, whether it be on an issue in *fact* or in *law*, is *that the writ or bill be quashed*^k; or if a temporary disability or privilege be pleaded, as excommunication, or the king's protection, infancy, &c. *that the plaint remain without day, until, &c.* On an issue in fact, the defendant is entitled to *costs*; but not on an issue in law^l.

^e *Id. ibid.*

^f Comb. 19.

^g 4 Bac. Abr. 51. Gilb.

C. P. 186. 2 Saund. 40, 41.

12 Mod. 230.

^h Hetl. 126.

ⁱ Com. Dig. tit. *Abatement*, p. 66. cites Th. D. l. x. c. 1.

^k Gilb. C. P. 52.

^l 2 Ld. Raym. 992. 1 Salk. 194. S. C.

CHAPTER XXVIII.

Of PLEAS in BAR; and NOTICE of SET-OFF.

PLEAS in bar are calculated to shew, either that the plaintiff never had any cause of action, or if he had, that it is discharged by some subsequent matter.

In actions upon *contracts*, the grounds of defence are, that there was no contract between the parties, in point of fact; or if there was, that it was void or voidable in point of law: Or if there was a good and valid contract, that it has been performed; or if not, that there is some legal excuse for the non-performance of it. Upon these grounds, it will appear that the plaintiff never had any cause of action; or admitting that he had, it may be discharged by some subsequent matter, as by accord and satisfaction, arbitrament, release, &c. Executors and administrators may also plead the want of assets. In actions for *wrongs*, the defendant may shew, that the plaintiff never had any cause of action, by denying the charge, or by justifying or excusing it; or he may discharge the action, by means similar to those in actions upon contracts.

Considered with reference to the declaration, pleas are in denial, or confession and avoidance,
of

of the cause of action; or they conclude the plaintiff by matter of estoppel^a. Pleas in denial, are of the whole, or a part of the declaration; and in avoidance, they are by matter precedent, which shews the plaintiff never had a cause of action, and is called an avoidance in law, or by matter subsequent, which discharges the cause of action, and is called an avoidance in fact^b.

When the defendant means to deny the whole charge contained in the declaration, or that which constitutes the gist or foundation of the action, he should plead the general issue; as, in *assumpsit*, *non assumpsit*^c; in *debt* or simple contract, *nil debet*; in *debt* on specialty, *non est factum*; in *debt* on record, *nul tiel record*; in *detinue*, *non detinet*; and in *trespass vi et armis*, and *trespass* on the *case*, not guilty.

In *assumpsit*, the general issue is proper, where there was either no contract between the parties, or not such a contract as the plaintiff has declared on. And the defendant may give in evidence under it, that the contract was *void* in law, by coverture^d, gaming^e, usury^f, &c. or *voidable* by infancy^g, duress, &c.; or if good in point of law, that

^a 5 Hen. VII. 14. 1 Leon. 77. Say. 86.

^b 5 Hen. VII. 14.

^c Append. Chap. XXVIII.

§ 1.

^d 12 Mod. 101.

^e 1 Ld. Raym. 87. 1 Salk. 344. Carth. 356. 5 Mod. 170.

12 Mod. 97. S. C.

^f 1 Str. 498.

^g 1 Salk. 279. 2 Bos. & Pnl. 481 (a).

that it was *performed*, by payment^h or otherwise, or if unperformed, that there was some legal *excuse* for the non-performance of it, as a release or discharge before breach, or non-performance by the plaintiff of a condition precedent, &c. This sort of evidence will shew that the plaintiff had no cause of action. But if he had, the defendant may give in evidence, under the general issue, that it was *discharged*, by an accord and satisfactionⁱ, arbitrament, account stated, release^j, foreign attachment^k, or former recovery for the same cause^l, &c. In short, the question in *assumpsit*, upon the general issue, is whether there was a subsisting debt, or cause of action, at the time of commencing the suit^m. But matters of lawⁿ, in avoidance

- ^h 1 Ld. Raym. 217. 566. Raym. 566. 12 Mod. 376.
 12 Mod. 376. S. C. 1 Salk. 394. S. C. Afterwards, a distinction
ⁱ 1 Ld. Raym. 566. 12 Mod. 376. S. C. was made between express and implied *assumpsits*:
^j Gilb. C. P. 64. Doug. In the former, these matters
 106, 7. 3 Esp. Cas. *Ni. Pri.* were still required to be
 234. pleaded, but not in the latter.
^k 1 Salk. 280. Vin. Abr. tit. *Evidence*, Z. a.
^l 2 Str. 733. 1 Salk. 280. Gilb. C. P. 65.
^m Doug. 106, 7. Gilb. C. P. At length, about the time of
 64, 5. Ld. *Holt*, they were univer-
ⁿ Hob. 127. 2 Vent. 295. sally allowed to be given in
 Formerly, matters in dis- evidence, under the general
 charge of the action must have issue. 1 Ld. Raym. 217
 been pleaded specially. 1 Ld. 566. 12 Mod. 376. S. C.

ance of the contract, or discharge of the action, are usually pleaded. And it is necessary to plead a tender, or the statute of limitations^o, &c. and to plead or give a notice of set-off.

In *covenant*, there is properly speaking no general issue; for though the defendant may plead *non est factum*, as in debt on specialty, yet that only puts the deed in issue, and not the breach of covenant: and *non infregit conventionem* is a bad plea^p. In this action therefore, the defendant must specially controvert the deed, or shew that he has *performed* the covenant, or is legally *excused* from the performance of it; or admitting the breach, that he is *discharged* by matter *ex post facto*, as a release, &c.

In *debt* on simple contract, *nil debet* is a good plea, or, in actions by executors and administrators, *non detinet*, in all cases where nothing was due to the plaintiff, at the time of commencing the action^q: And under this plea, the defendant may not only put the plaintiff upon shewing the existence of a legal contract, but he may give in evidence the *performance* of it. He may also give in evidence, under this plea, a release, or other matter in discharge of the action^r: And it has even been

^o 1 Ld. Raym. 153. Gilb. (2 W. 17.)

C. P. 66.

^r 1 Ld. Raym. 566. 12 Mod

^p 1 Lev. 183. 3 Lev. 19. 376. S. C. 1 Ld. Raym. 394.

1 Sid. 289. 8 T. R. 278. S. P. Gilb. *Debt*, 434. 443.

^q Com. Dig. tit. *Pleader*, *semb. contra*.

been holden, that as the plea is in the present tense, the statute of limitations may be given in evidence under it^s: But in *debt* for rent, on an indenture of lease, if the defendant plead *nil debet*, he cannot give in evidence, that the plaintiff had nothing in the tenements; because, if he had pleaded that specially, the plaintiff might have replied the indenture and estopped him^t. And in debt *qui tam*, the defendant was not allowed to give in evidence, on *nil debet*, a former recovery against him by another person, for the same cause^u. In this action also, as in *assumpsit*, a tender and set-off must be specially pleaded.

Where a specialty is but inducement to the action, and matter of fact the foundation of it, there *nil debet* is a good plea; as in debt for rent by indenture, for the plaintiff need not set out the indenture: so in debt for an escape^v, or on a *devastavit* against an executor^w, the judgment is but inducement, and the escape and *devastavit* are the foundation of the action. But where the deed is the foundation, and the fact but inducement, there *nil debet* is no plea; as in debt for a penalty on articles of agreement^x, or on a bail-bond^y.

It

^s 1 Ld. Raym. 153. 2 East, 336. *per Lawrence, J.*

^t 1 Salk. 277.

^u 1 Str. 701, 2.

^v 2 Salk. 565.

^w 1 Saund. 219. Cart. 2.

^x 2 Ld. Raym. 1500. 2 Str. 778. 1 Barnard. K. B. 15. 8

Mod. 106. 323. 382. S. C.

^y *Id.* Fort. 363. 367.

It sometimes happens, that instead of pleading the general issue of *nil debet* to the whole declaration, the defendant, for greater certainty, will select and deny some particular fact, necessary to maintain the action; as the demise in debt for rent on a parol lease, to which he may plead *non demisit* ^z; but he cannot plead this plea, in debt for rent on an indenture ^a; and it is said, that *riens en arrere* is not a good plea, without concluding *et issint nil debet* ^b.

In *debt* on bond, or other specialty, the general issue of *non est factum* is good, in all cases where the deed was not executed, or varies from the declaration ^c. And the defendant may give in evidence under it, that the deed was void at common law *ab initio* ^d, being obtained by fraud, or made by a married woman, lunatic ^e, &c. or that it became void after it was made, and before the commencement of the action ^f, by erasure, alteration, cancelling, &c.; or that it was delivered as an escrow ^g, to a third person. But he cannot give in evidence, under the general issue, that the deed

^z Gilb. *Debt*, 438.

341. 347.

^a *Id.* 436.

^e 2 Str. 1104. but see 2 Salk.

^b *Id.* 440. cites Bro. *Dette*, 675.

113. Keilw. 153.

^f 5 Co. 119. b. Sav. 71.

^c Com. Dig. tit. *Pleader*, *semb. contra*.

(2 W. 18.)

^g 2 Rol. Abr. 683. l. 5. T.

^d 5 Co. 119. and see 2 Wils. Raym. 197. Mod. Cas. 217.

deed was *voidable*^h, by infancy, duress, *per minas*ⁱ, &c. or that it was *void* by act of parliament^j, as by the 23 *Hen. VI. c. 9.* relating to sheriffs' bonds, or by the statutes of usury^k, or gaming, &c. In these cases therefore, the defendant must plead specially: So he must plead *payment*, at or after the day, *performance*, or any matter in *excuse* of performance, as *non damnificatus* to a bond of indemnity, *no award* to an arbitration-bond, or to a bail-bond, no process to arrest the defendant^l, &c. He must also plead specially, in *discharge* of the action, a tender, set-off, satisfaction, former recovery, or release, &c.

In *debt* on record, the general issue of *nul tiel record* is proper, where there is either no record at all, or one different from that which the plaintiff has declared on^m. But as this plea only goes to the existence of the record, the defendant must plead payment, or any matter in discharge of the action.

In *detinue*, the defendant may give in evidence, under the general issue of *non detinet*, a gift from the plaintiff; for that proves he detaineth not the plaintiff's goodsⁿ. But he cannot give in evidence,

^h 5 Co. 119. a. Gilb. *Debt*,
437. 2 Salk. 675. 1 Ld.
Raym. 315. S. C.

ⁱ 2 Inst. 482, 3.

^j 5 Co. 119. a

^k 1 Str. 498.

^l Say. Rep. 116.

^m Gilb. *Debt*, 444. 3 Mod. 41.

ⁿ Co. Lit. 283.

dence, that the goods were pawned to him for money, which is not paid; but he must plead it.

In trespass to *persons*, the general issue of *not guilty* may be properly pleaded, if the defendant committed no assault, battery, or imprisonment, &c.; in trespass to *personal* property, if the plaintiff had no property in the goods; and in trespass to *real* property, if he was not in possession of the land, &c. And *liberum tenementum*, or other evidence of title or right to the possession, may be given in evidence, under the general issue^o. But regularly, by the common law, matter of excuse or justification must be *specially* pleaded^p; as in trespass to persons, *son assault demesne*; or in trespass to real property, a licence^q; that the beasts came through the plaintiff's hedge, which he ought to have repaired; or in respect of a rent-charge, common, or the like^r. And the defendant must plead specially a release, or other matter in *discharge* of the action^s. But in actions against justices, &c. and in various other cases, the defendant, by act of parliament, is allowed to plead the general issue, and give the special matter in evidence^t.

In

^o Andr. 108. Willes, 222. but see 21 Hen. VII. 28. a.
7 T. R. 354. 8 T. R. 403. *per Rede, contra.*

^p Co. Lit. 282, 3. 2 Rol. ^r Co. Lit. 283.
Abr. 682. 12 Mod. 120. ^s 3 Bur. 1353.

^q Hob. 174, 5. 2 T. R. 168. ^t Co. Lit. 283.

In actions upon the *case*, the defendant, upon the general issue of not guilty, may not only put the plaintiff upon proof of the whole charge contained in the declaration, but may offer any matter in excuse or justification of it^u; or he may set up a former recovery, release, or satisfaction^v: For an action upon the case is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and in effect is so; and therefore such a former recovery, release, or satisfaction need not be pleaded, but may be given in evidence: since whatever will, in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may, in this action, be given in evidence by the defendant; because the plaintiff must recover upon the justice and conscience of his case, and upon that only. In *trover*, it is commonly said, there is no special plea except a release; but this is a mistake, for the defendant may plead specially any thing else, which, admitting the plaintiff had once a cause of action, goes to discharge it, as the statute of limitations^w, a former recovery^x, or bankruptcy in the plaintiff^y, &c. In an action for *words*, the truth of the words cannot
be

^u 2 Mod. 276, 7. 3 Mod. Rep. 388. S. C.

166. Com. Rep. 273. 1 Wils. ^w 1 Lutw. 99.

44. 175. ^x 1 Show. 146.

^y 3 Bur. 1353. ^z 1 Blac. ^v 7 T. R. 391.

be given in evidence, under the general issue of not guilty². And by the 8 & 9 W. III. c. 27. § 6. “no retaking on fresh pursuit shall be given in evidence, on the trial of any issue, in any action of *escape*, against the marshal, &c. unless the same shall be specially pleaded; nor shall any special plea be received or allowed, unless oath be first made in writing by the defendant, and filed in the proper office, that the prisoner, for whose escape such action is brought, did escape without his consent, privity or knowledge.”

Where the defence consists of matter of fact, and the general issue may, it ought to be pleaded; it being in such case a good cause of demurrer, that the plea amounts to the general issue^a. But it is observable, that in many cases, where the defence consists of matter of law, the defendant may either plead it specially, or give it in evidence under the general issue; as in *assumpsit*, infancy, accord and satisfaction, or a release, &c. may be either pleaded, or given in evidence upon *non assumpsit*; and in *debt* on bond, made by a married woman, the defendant may either plead coverture, or give it in evidence upon *non est factum*. In these cases, from the nature of the defence, the plaintiff has an *implied colour* of action,

² Willes, 20. 2 Str. 1200.

^a Co. Lit. 303. b. *Doc. fil.*

1 Bos. & Pul. 525. 2 Bos. & 203, 4. Gilb. C. P. 60, 1.

Pul. 225 (*a*).

action, bad indeed in point of law, if the facts pleaded be true, but which is properly referred to the decision of the court. And where, from the nature of the defence, the plaintiff would have no implied colour of action, the defendant, in some cases, is allowed to give him an *express colour*^b. Thus, in the common and almost only case where express colour is now given, if in an action of trespass *quare clausum fregit*, the defendant plead a possessory title, under a demise from a third person, (for if he claim under the plaintiff, there is an implied colour,) this, without more, would amount to the general issue^c; for it goes to deny that the trespass was committed in the *plaintiff's* close: but if the defendant, after stating his own title, supposes, (as is usual) that the plaintiff entered upon him, under colour of a former deed of feoffment without livery, and that he re-entered, this creates a question of law, for the decision of the court; and by that means prevents the plea from amounting to the general issue: and being matter of supposal, it is not traversable.

In trespass for taking goods, if the defendant plead that *A.* was possessed of them, as of his proper goods, and sold them in market-overt, or that *B.* stole the goods from *A.* and waived them
within

^b For the difference between *express* and *implied* colour, see an argument of *Holt*, in *Reg. Plac.* 303.
^c 8 T. R. 406. 1 East, 215.

within his manor, wherefore he took them, the defendant must give colour; for his plea proves that no property was in the plaintiff, so he had no colour of action: And the colour usually given in such cases is, that the defendant bailed the goods to a stranger, who delivered them to the plaintiff, from whom the defendant took them. But in the same cases, if the defendant plead that *A.* sold the goods in market-overt, without saying that they were his own, or that *B.* took them *de quodam ignoto.* and waived them, the plea is good without colour; for it does not deny but that the property was in the plaintiff, and the defendant is not bound to shew expressly in whom it was^d.



The plea of the general issue is frequently accompanied with a *notice of set-off*; and therefore it will here be proper to consider the doctrine of setting off mutual debts against each other.

At common law, if the plaintiff was indebted to the defendant in as much, or even more than the defendant owed to him, yet he had no method of striking a balance: the only way of obtaining relief, was by going into a court of equity.

^d Dr. *Leyfield's* case, 10 Co. Doct. & Stud. lib. 2. c. 55. 90. b. And for more of the 3 Salk. 273. 3 Blac. Com doctrine concerning *Colour*, 309.
see the same case, *per totum*.

equity^c. To remedy this inconvenience, it was enacted by the statute 2 Geo. II. c. 22. § 13. “that where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other; and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, *notice* shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due; or otherwise such matter shall not be allowed in evidence, upon the general issue.” This clause was made perpetual, by the 8 Geo. II. c. 24. § 4.; and it having been doubted, whether mutual debts of a *different* nature could be set against each other, it was by the last-mentioned statute^f, further enacted and declared, “that by virtue of the said clause, mutual debts may be set against each other, either by being pleaded in bar, or given in evidence on the general issue, in the manner therein mentioned, notwithstanding that such debts

^c 2 Bur. 820. 4 Bur. 2220. ^f § 5.

“debts are deemed in law to be of a different
 “nature; unless in cases where either of the
 “said debts shall accrue by reason of a penalty,
 “contained in any bond or specialty; and in all
 “cases, where either the debt for which the
 “action hath been or shall be brought, or the
 “debt intended to be set against the same, hath
 “accrued, or shall accrue, by reason of any such
 “penalty, the debt intended to be set off shall
 “be pleaded in bar; in which plea shall be
 “shewn, how much is truly and justly due on
 “either side; and in case the ‘plaintiff shall re-
 “cover in any such action or suit, judgment
 “shall be entered for no more than shall appear to
 “be truly and justly due to him, after one debt
 “being set against the other as aforesaid.”

The actions, in which a set-off is allowable upon these statutes, are *debt*, *covenant*, and *assumpsit*, for the non-payment of money; and the demand intended to be set off must be liquidated^h, and such as might have been made the subject of one or other of these actions. A set-off therefore is never allowed in actions upon the

g The day after the last act have been set off against a passed, Lord *Hardwicke* Ch. J. specialty debt. *Brown & Holy-oak*, 8 Geo. II. Bul. *Ni. Pri.* delivered the opinion of the court of King’s Bench, that 179. Willes, 262, 3.
 a debt by simple contract ^h *Peake*, Cas. *Ni. Pri.*, 41. might, by the former act,

the *case*, *trespass*, or *replevin*ⁱ, &c.; nor in *debt* on bond conditioned for the performance of covenants^j, &c.; nor in *covenant*, or *assumpsit* for general damages^k: And a penalty^l, or uncertain damages^m, cannot be made the subject of a set-off. But where a bond is conditioned for the payment of an annuityⁿ, or of *liquidated* damages^o, a set-off may be allowed: And a judgment may be pleaded by way of set-off, though a writ of error be pending thereon^p. A debt barred by the statute of limitations cannot be set off; and if it be pleaded in bar to the action, the plaintiff may reply the statute of limitations^q, or if given in evidence, on a notice of set-off, it may be objected to at the trial^r.

The debts sued for, and intended to be set off, must be *mutual*, and due in the same right: therefore a joint debt cannot be set against a separate demand, nor a separate debt against a joint one^s; but a debt due to a defendant as surviving

ⁱ Barnes, 450. *Bul. Nī. Pri.*
181. S. C. *Graham v. Fraine*,
H. 24 Geo. II. and *Laycock*
v. Tuffnell, E. 27 Geo. III.
K. B. S. P. but see 4 T. R.
511.

^j *Bul. Nī. Pri.* 179. Willes,
261.

^k 1 Esp. Cas. *Nī. Pri.* 378.
but see 1 East, 375.

^l 2 Bur. 1024.

^m 1 Blac. Rep. 394. 2 Blac.
Rep. 910. Cowp. 56. 6 T. R.
488.

ⁿ 2 Bur. 820.

^o 2 T. R. 32.

^p 3 T. R. 188. *in notis*.

^q 2 Str. 1271.

^r *Bul. Nī. Pri.* 180.

^s But see Peake, Cas. *Nī. Pri.*
197. 2 Esp. Cas. *Nī. Pri.*
469. 524.

surviving partner, may be set off against a demand on him in his own right^t, and *vice versa*^u. In an action of debt against a man on his own bond, he cannot set off a debt due to him in right of his wife^v. And a debt owing by the wife *dum sola*, cannot be set off in an action brought by the husband alone, unless he has promised to pay the debt after marriage, and thereby made it his own^w. Neither, for the same reason, can a defendant, sued as executor or administrator, set off a debt due to himself personally; nor, if sued for his own debt, can he set off what is due to him as executor or administrator. And where an executor sues for a cause of action arising after the testator's death, the defendant cannot set off a debt due to him from the testator^x. But where an action is brought by or against a *trustee*, a set-off may be made, of money due to or from the *cestuy que trust*^y. It was formerly holden, that a set-off could not be allowed, as against the assignees of a bankrupt^z; but it has since been determined, that in an action at their suit, the defendant may set off a debt due to him, at the time of the bankruptcy:

^t 5 T. R. 493. 1 Esp. Cas. (a). Bul. *Ni. Pri.* 180.
Ni. Pri. 47. ^y 1 T. R. 622. and see
^u 6 T. R. 582. and see 2 T. Willes, 400. 2 Esp. Cas.
Ni. Pri. 557. 7 T. R. 359.
^v Bul. *Ni. Pri.* 179. S. C.
^w 2 Esp. Cas. *Ni. Pri.* 594. ^z 1 Wils, 155.
^x Willes, 103. 106 (1). 264.

bankruptcy^a: But a note indorsed to him afterwards, cannot be set off^b; nor cash-notes issued by the bankrupt before his bankruptcy, and payable to bearer, unless the defendant shew further, that such notes came to his hands before the bankruptcy^c.

Where either of the debts accrues by reason of a *penalty*, the debt intended to be set off must be pleaded in bar; and the defendant in his plea, must aver what is really due^d, which averment has been held to be traversable^e, though laid under a *videlicet*^f: But in all other cases, the defendant may either plead or give notice of set-off, at his election^g. If at the time of the action brought, a larger sum was due from the plaintiff to the defendant, than from him to the plaintiff, the action being barred, it seems more proper to plead the set-off; and it is usually pleaded in country causes, to save the trouble and expense of proving the service of a notice. But where the sum intended to be set off is less than that for which the action is brought, a notice of set-off should be given^h.

The notice of set-off should regularly be given
with,

^a Cowp. 133. and see the
stat. 5 Geo. II. c. 30. § 28.

^b 2 Str. 1234.

^c 6 T. R. 57.

^d Stat. 8 Geo. II. c. 24. § 5.

^e 3 T. R. 65.

^f 6 T. R. 460.

^g 2 Bur. 1231. *Bul. Ni. Pri.*

179.

^h *Bul. Ni. Pri.* 179

with, or at the time of pleading the general issueⁱ: Though if it be not then given, the court on motion, will give the defendant leave to withdraw the general issue, and plead it again with a notice of set-off^k; and such notice may be given with the general issue, after the defendant has been ruled to abide by his plea^l. In point of form, a notice of set-off should be almost as certain as a declaration: therefore where the notice of set-off was in these words, “Take notice that you are “indebted to me, for the use and occupation of an “house, for a long time held and enjoyed, and now “lately elapsed;” it was deemed insufficient^m: and it afterwards appearing, that the debt intended to have been set off was rent reserved on a lease by indenture, which was not mentioned in the notice, the chief-justice said it was bad on that account also; for if this had been shewn, the plaintiff might probably have proved an eviction, or some other matter to avoid the demandⁿ. The notice of set-off is usually written underneath the plea, and delivered therewith to the plaintiff’s attorney; and a copy of the notice should be kept by the defendant’s

ⁱ Append. Chap. XXVIII.

§ 2.

^k 2 Str. 1267.

^l 1 T. R. 634. *in notis*.

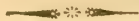
^m Bul. N. Pri. 179. But

note, this was before the stat.

11 Geo. II. c. 19. which gives the action for use and occupation.

ⁿ And see 2 Esp. Cas. N. Pri. 560. 569

fendant's attorney, it being necessary to prove the delivery of it, at the trial of the cause^o.



Pleas are *single* or *double*; or in other words, the defendant may rely upon a single ground, or plead several matters in his defence. At common law, the defendant could only have pleaded a single matter to the whole declaration; which rigour often abridged the justice of his defence, and was doubtless one cause of perplexed in-artificial pleading; the party endeavouring to crowd as much reasoning as he could into his plea, however intricate, repugnant, and contradictory he made it, by so doing^p. But even at common law, the defendant might have pleaded several matters, to different parts of the declaration; as not guilty to part, and to other part a justification, or release, &c. And where there were several defendants, each of them might have pleaded a single matter to the whole, or several matters to different parts of the declaration^q. And now, by the statute for the amendment of the law^r, “the defendant or tenant in
“any action or suit, or any plaintiff in replevin,
“in any court of record, may, with the leave of
“the

^o 1 Crompt. 160.

^p 2 Eunom. 141.

^q Co. Lit. 303. a.

^r 4 Ann. c. 16. § 4, 5.

“ the same court, plead as many several matters
 “ thereto, as he shall think necessary for his de-
 “ fence: Provided nevertheless, that if any such
 “ matter shall, upon a demurrer joined, be judged
 “ insufficient, costs shall be given at the discre-
 “ tion of the court; or if a verdict shall be found,
 “ upon any issue in the said cause, for the plain-
 “ tiff or demandant, costs shall be also given, in
 “ like manner; unless the judge who tried the
 “ said issue, shall certify that the said defendant
 “ or tenant, or plaintiff in replevin, had a probable
 “ cause to plead such matter, which upon the said
 “ issue shall be found against him. Provided also,
 “ that nothing in this act shall extend to any writ,
 “ declaration, or suit of appeal of felony, &c. or to
 “ any writ, bill, action, or information upon any
 “ penal statute^s.”

Upon this statute it has been holden, first, that the defendant shall not be allowed to plead *non assumpsit*^t, or *non est factum*^u, to the whole declaration, and a *tender* as to part; for one of these pleas goes to deny that the plaintiff ever had any cause of action, and the other partially admits it: secondly,

^s Same statute, § 7.

& Pul. 222. or *non assumpsit*

^t 4 T. R. 194. And in the common pleas, the defendant cannot plead *non assumpsit* and the stock-jobbing act; 1 Bos.

and alien-enemy. *Id.* (a). 2 Bos. & Pul. 72.

^u 5 T. R. 97.

condly, that he shall not plead several matters which require different trials, as in dower, *ne unques accouple en loyal matrimonie*, and a mortgage or *ne unques seisie que dower*^v; for the first matter is triable by the bishop, and the others by a jury, and if the former be found against the defendant, the judge cannot certify that he had a probable cause of pleading it: thirdly, that the king is not bound by this statute; and therefore where the king is plaintiff in a *quare impedit*, the defendant cannot plead double^w: fourthly, that the statute does not extend to any action or information upon a penal statute^x.

But subject to these exceptions, the defendant may plead as many different matters as he shall think necessary for his defence, though they may appear to be contradictory or inconsistent; as *non assumpsit* and the statute of limitations, or in trespass, not guilty, a justification, and accord and satisfaction, &c. So he may plead *non assumpsit* and infancy, or not guilty and *liberum tenementum*; though, as infancy may be given in evidence upon *non assumpsit*, and *liberum tenementum* upon not guilty, the pleading of these matters specially seems

^v Com. Rep. 148. 2 Blac. Hardw. 262. 2 Str. 1044. S. C. Rep. 1157. 1207. but see 4 T. R. 701. K. B. Pr. Reg. 318. Barnes, 15. 353. 365. 2 Wils. 118. *semb. contra.*

^w Willes, 533.

Wils. 21. 1 Bos. & Pul. 222.

^x § 7. *Ante*, 609. and see 1 C. P. Barnard. K. B. 17. *Cas. temp.*

seems to be unnecessary. And by the statute 32 Geo. III. c. 58. it is enacted, that “it shall
 “be lawful for the defendant to any information
 “in the nature of a *quo warranto*, for the exercise
 “of any office or franchise in any city, borough,
 “or town corporate, to plead that he had first
 “actually taken upon himself, or held or executed
 “the office or franchise which is the subject of
 “such information, six years or more before the
 “exhibiting of such information, &c.; which plea
 “shall and may be pleaded either singly, or toge-
 “ther with and besides such plea as he might
 “have lawfully pleaded before the passing of the
 “act; or such several pleas as the court on mo-
 “tion shall allow.” In the construction of which
 statute it has been holden, that the legislature in-
 tended to give a defendant in such a proceeding,
 the liberty of pleading several pleas, whether with
 or without the plea of the statute of limitations;
 the concluding words of the act being, “or such
 several pleas, &c.^y.”

In order to plead two or more matters, it is
 not necessary that an affidavit should be made of
 the facts; but the court formerly expected to be
 informed what the matters were, that were desired
 to be pleaded, in order to judge whether they were
 proper^z; though now, the motion for leave to
 plead

^y 8 T. R. 467.

^z R. T. 5 & 6 Geo. II. (b).

plead several matters is become a mere motion of course, which only requires a counsel's signature: And the motion-paper being delivered to the clerk of the rules, he will draw up a rule thereon, a copy of which should be delivered with the plea, if it be then ready; or otherwise the plaintiff's attorney should have notice, that instructions have been given for the rule, and that a copy will be delivered as soon as it is drawn up. If a double plea be filed, without a rule to plead several matters being drawn up, or instructions given for it to the clerk of the rules, it is a nullity; and the plaintiff may sign judgment^a: But if a rule be obtained, and the plea put in, without saying by leave of the court, it is only an irregularity, or at most cause of special demurrer for duplicity^b.

Respecting costs, upon this statute, the intention of the legislature appears to have been, that if there be several matters pleaded, some of which are found for the plaintiff, he shall be entitled to the

^a *Per Buller*, Just. in *Bedford and Gatfield*, H. 26 Geo. III. K. B. Or the plaintiff, in the common pleas, may apply to the court, to strike out one of them. 1 Bos. & Pul. 415.

^b 1 Wils. 219. and see court held, that though an information against several defendants, for usurping several offices, can only be filed *by leave of the court*, yet that leave need not appear on the record. Cowp. 500, 501. where the

the costs of those^c, notwithstanding other matters are found for the defendant, which entitle him to judgment upon the whole record; unless the judge before whom the cause was tried, shall certify that the defendant had a probable cause to plead the matters which are found against him. That this is the true construction of the statute, will appear from the following cases.

In trespass, the defendant pleaded not guilty and several justifications; upon the trial, the plaintiff not proving his possession of the *locus in quo*, the defendant had a verdict; and, by direction of *Denison J.* the verdict was entered upon the general issue only; upon which there was a motion for a *venire de novo*: but the court refused the motion, saying, the verdict was complete, and determined the cause; that the plaintiff was not entitled to damages, though, they said, he might have insisted to have a verdict entered on the other issues, for the sake of costs, which he would be entitled to, unless the judge certified that the defendant had probable cause

^c In *Sayer's Law of Costs*, seems to be a mistake; for the p. 223. it is said, he shall have defendant, being entitled to the costs not only of *those* matters, but also of the *others*, notwithstanding they are found judgment upon the matters found for him, is consequently entitled to the costs of for the defendant. But this them

cause to plead such plea^d. But where the defendant, in trespass, pleaded three different justifications, to three different counts, and on issue joined, had a verdict for him on two, and against him on the third; on motion, this was holden not to be a case within the act, and that the plaintiff was entitled to costs at common law, on the whole declaration^e.

Where the defendant pleads not guilty, and a justification to which the plaintiff demurs, and the plaintiff has judgment on the demurrer, but is nonsuited on the plea of not guilty, he shall nevertheless be allowed the costs of the demurrer, which shall be deducted out of the costs allowed to the defendant^f. And if one of several pleas, pleaded by the defendant, be adjudged bad, on a demurrer to the plaintiff's replication, the plaintiff is entitled to have the costs of those pleadings deducted, from the costs taxed for the defendant upon the *postea*, if afterwards, upon the trial of the issues joined on the other pleas, the defendant should have a verdict; even though it should appear, on the whole of the record, that the plaintiff had no cause of action^g. But if the plaintiff take issue on several pleas, one of which is insufficient in law, and has a verdict on all the issues, except that

^d Bul. *Ni. Pri.* 335.

^f Barnes, 136.

^e *Id. ibid.* but note, this was in the Common Pleas.

^g 2 T. R. 391.

that joined on the insufficient plea, which is found for the defendant, and afterwards judgment is entered for the plaintiff, still he shall not be allowed any costs upon the issue found for the defendant^h. And it has been resolved, at a meeting of all the judges, that if there be a certificate upon the 43 *Eliz.* the plaintiff shall not have the costs of any plea pleaded with leave of the court; although the issue thereupon joined be found for him, and the judge have not certified, that the defendant had a probable cause for pleading the matter therein pleadedⁱ.

In an action for criminal conversation, the defendant pleaded two pleas, *viz.* not guilty, and not guilty within *six* years; on the former, the plaintiff joined issue, and obtained a verdict, but to the latter there was a demurrer, and judgment against him; and it was holden, that the defendant should have the costs of the demurrer, but upon the trial, there should be no costs on either side^k.

The *avowant* or defendant in replevin, though not within the words, is plainly within the meaning

^h 1 T. R. 226. but see Barnes, 133.

ⁱ Say. Rep. 260.

^k 2 Bur. 753. 2 Wils. 85. Say. Costs, 221. S. C. The authority of this case seems to be questionable, as to the costs

of the trial, from a similar one that was differently determined, in the court of Common Pleas, (Barnes, 141.) as well as from the reasoning that prevailed in several of the foregoing cases.

ing of the statute 4 *Ann.* c. 16. And accordingly, where some issues in *replevin* are found for the plaintiff, which entitle him to judgment, and some for the defendant, the latter must be allowed the costs of the issues found for him, out of the general costs of the verdict; unless the judge certify, that the plaintiff had a probable cause for pleading the matters on which those issues are joined¹: And the general rule is said to be, that where several matters are pleaded by the plaintiff, some of which are found for him, and others for the defendant, so that the plaintiff is entitled to judgment; if the judge who tried the cause certify, that there was a probable cause for pleading those pleas, the master is not to deduct the costs of the issues so found for the defendant; but if there be no certificate, the defendant is entitled to have those costs deducted for him^m.

If the plaintiff in *replevin* plead several pleas in bar, upon which issues are joined, and some issues are found for the plaintiff, and some for the defendant, the latter is entitled, in the Common Pleas, to such costs of the *trial*, as relate to the issues on which he has succeeded, as well as to the costs of the *pleadings*ⁿ. But if a defendant in *replevin*, after trial and verdict for the plaintiff, obtain

¹ 2 T. R. 235.

in notis, accord.

^m *Id.* 237. and see Barnes, ⁿ 2 Bos. & Pul. 368.
141. 144. 146. Doug. 708, 9.

tain judgment *non obstante veredicto*, in consequence of the plaintiff's pleas in bar being bad, he is not entitled, in the same court, to any costs upon the pleadings, subsequent to the pleas in bar, because he should have demurred to them^o. The certificate of probable cause is not required to be made in court, at the trial of the cause^p: and, where the judge refuses to grant it, the court have not a discretionary power, whether they will allow the plaintiff any costs at all; but are bound by the statute to allow him some costs, though the *quantum* is left to their discretion^q.



The general qualities and conditions of a plea are first, that it be conformable to the count^r; and, taken collectively, answer the whole declaration: For if any part of the declaration be left unanswered, it operates as a discontinuance. If a plea begin as an answer to the whole, but in truth the matter pleaded be only an answer to part, the whole plea is naught, and the plaintiff may demur^s; but if a plea begin only as an answer to part, and be in truth but an answer to part, it is a discontinuance, and the plaintiff must not demur, but take his judgment for the part unanswered,

^o 2 Bos. & Pul. 376.

^r Co. Lit. 303. a.

^p Barnes, 141.

^s And so *vice versâ*, 2 Bos.

^q *Id.* 140. 2 T. R. 394, 5. & Pul. 427.

unanswered, as by *nil dicit*; for if he demur, or plead over, the whole action is discontinued^t. Secondly, the plea at common law should be *single*, consisting only of one fact, or of several facts making together one point: for if a plea contain duplicity, or allege several distinct matters, which require several answers to the same thing, it is bad^u. Thirdly, it should be *certain*^v, in point of form, as well as substance: but certainty to a common intent is sufficient^w; and that which is apparent to the court, by necessary collection out of the record, or is necessarily implied, need not be expressed^x; as in setting forth the feoffment of a manor, it is unnecessary to state livery and attornment: So, that which is alleged by way of conveyance, or inducement to the substance of the matter, need not be so certainly alleged, as that which is the substance itself^y. Fourthly, every plea, for the sake of certainty, must be *direct and positive*, and not by way of argument or rehearsal^z. Fifthly, it should be so pleaded, as to be *capable of trial*, by the court upon demurrer or *nul tiel record*, or by the jury upon an issue in fact^a. Sixthly, it should be *true*, and capable of proof;

^t 1 Salk. 179, 80. Gilb.
C. P. 155. 157. Willes, 480.
^u H. Blac. 645. 1 Bos. & Pul.
111.

^v Co. Lit. 304. a.

^w *Id.* 303. a.

^x *Id.* 303. b.

^y *Id. ibid.*

^z *Id.* 303. a.

^a *Id. ibid.* & 304. a. Hob.
295.

^b Co. Lit. 303. b. 9 Co.
24, 5. March, 207.

proof; for truth is said to be the goodness and virtue of pleading, as certainty is the grace and beauty of it^b. Seventhly, the plea shall be taken most strongly against him that pleadeth it, for every man is presumed to make the best of his own case^c. But lastly, *surplusage* shall never make the plea vitious, except where it is repugnant, or contrary to matter precedent^d.

In many cases, the law doth allow *general* pleading, for avoiding prolixity and tediousness; and the particulars shall come on the other side^e. Thus, when a man is bound to perform all the covenants in an indenture, if they are all in the affirmative, he may plead performance generally: but if any are in the negative, to so many he must plead specially, (for a negative cannot be performed,) and generally to the rest. So, if any are in the disjunctive, he must shew which of them he hath performed^f: And if any are to be done of record, he must shew the performance of those specially, and cannot involve them in general pleading. In setting forth a title, general estates in fee-simple may be generally alleged; but the commencement of estates-tail, and other particular

^b Hob. 295.

^c Co. Lit. 303. b.

^d *Id. ibid.* For the several cases that illustrate the above

rules, see Com. Dig. tit. *Pleader*, (E.) &c.

^e Co. Lit. 303. b.

^f *Id. ibid.*

particular estates, must regularly be shewn, unless in some cases, where they are alleged by way of inducement^g: And the life of tenant in tail, or for life, ought to be averred^h.

Every plea ought to have its proper *conclusion*ⁱ: When the general issue is pleaded, or the defendant simply denies some material fact alleged in the declaration, he should conclude his plea by putting himself upon the country; but where the plea advances new matter in the *affirmative*, the defendant should conclude it with an averment, or verification and prayer of judgment *si actio*; or in other words, by professing himself ready to verify the plea, and praying judgment, if the plaintiff ought to have or maintain his action against him. An *avowry* however, wherein the defendant is an actor, and which is in the nature of a count, need not be averred^k; nor pleas which are merely in the *negative*, because a negative cannot be proved. Where a judgment, or other matter of record, is pleaded, the plea should conclude with a verification *by the record*: And where in *debt*, the matter of the plea shews there never was a good cause of action, as in *debt* on bond against an heir, who pleads *riens per descent*, the defendant, instead of concluding that the plaintiff ought not

to

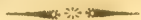
^g Co.Lit. 303. b. *Ante*, 394, 5.

ⁱ *Id. ibid.*

^h *Id. ibid.*

^k Co. Lit. 303. a.

to have his action, may conclude that he (the defendant) ought not to be charged with the debt, by virtue of the writing obligatory¹. In an action of *debt*, the defendant, in pleading a tender, ought to conclude his plea, by praying judgment if the plaintiff ought to have or maintain his action, to recover *any* damages against him; for in this action, the debt is the principal, and the damages are only accessory: but in *assumpsit*, the damages are the principal; and therefore, in pleading a tender, the defendant ought to conclude his plea, with a prayer of judgment, if the plaintiff ought to have or maintain his action, to recover any *more* or *greater* damages than the sum tendered, or *any* damages by reason of the non-payment thereof^m. In pleading matter of estoppel, the defendant in his conclusion ought to rely upon itⁿ.



The general issue is engrossed on treble-penny stamped paper, and delivered to the plaintiff's attorney, or entered in the general-issue book, kept by the clerk of the judgments^o; and it need not be signed by counsel. There are also certain *common* pleas, that need not be signed or filed, but

¹ 2 Salk. 516.

ⁿ Co. Lit. 303. b.

^m *Id.* 622, 3. 1 Ld. Raym. 254. S. C. Willes, 13.

^o R. T. 5 & 6 Geo. II. (b).

but may be delivered to the plaintiff's attorney; such as *plene administravit*, bankruptcy in the defendant ^p, a special *non est factum*, *solvit ad diem* ^q, *comperuit ad diem* to a bail-bond, or *nul tiel record* to an action on a judgment or recognisance; in covenant, when the plea concludes to the country; and in trespass, *son assault demesne*, *liberum tenementum*, or not guilty to a new-assignment. All pleas and demurrers upon writs of error, *scire facias*, and *audita querela*, ought also to be delivered ^r; and, by a late rule ^s, pleas cannot be delivered after ten o'clock at night. But except in the foregoing cases, all special pleas must be signed by counsel ^t; and filed in the office of the clerk of the papers ^u, who makes copies of them, if required, for the plaintiff's attorney. And all *double* pleas must be filed, and not merely delivered to the plaintiff's attorney; though two pleas be pleaded, which separately need only have been delivered ^v.

The

^p 6 T. R. 496. But in the Common Pleas, a plea of bankruptcy must be signed by a serjeant. 3 Bos. & Pul. 171. and in that court, a tender of issue must be so signed, but a joinder in issue need not. *Id. ibid.* 1 Bos. & Pul. 469.

^q 5 T. R. 661. In this case, it was determined, that the plea of *solvit ad diem* should be delivered to the plaintiff's attorney, and not entered in the

general-issue book, or filed with the clerk of the papers.

^r R. T. 12 W. III. (a).

^s R. M. 41 G. III. 1 East, 132.

^t R. E. 18 Car. II. and for the origin and reason of the signature of pleas by counsel, see 2 Wils. 74.

^u R. T. 2 Jac. I. R. T. 16 Car. II. R. M. 2 W. & M

^v 2 East, 225.

The defendant cannot commonly *waive* the general issue, or a general demurrer, and instead thereof give a special plea or demurrer^w: but it is said, that if the general issue be not entered, the defendant may waive it, and plead specially, without leave of the court, in four days^x; or, as it should seem, before the adjournment day of the term^y, or within the first five days of the ensuing term^z; and even afterwards, where it is not to the prejudice or delay of the plaintiff, the defendant, by leave of the court, may withdraw the general issue, in order to plead specially^a, or in order to plead it again, with a notice of set-off^b, or upon bringing money into court^c.

If a special plea, or special demurrer, be put in, and the book is made up, and delivered to the defendant's attorney, he may, by the ancient practice of the court, strike out the special plea or demurrer, and return it with the general issue, or a general demurrer^d. To prevent this, if the defendant plead a dilatory or frivolous plea, the court in term-time, or a judge in vacation^e, will order him

^w R. T. 5 & 6 Geo. II. (b). 177. 254. 1 Blac. Rep. 357.

1 Wils. 29. *in marg.* Rich. 2 Wils. 204.

K. B. 255.

^b 2 Str. 1267.

^x 1 Ld. Raym. 674. 3 Salk.

^c *Id.* 1271. 1 Wils. 254.

211. 274. S. C.

S. C. cited.

^y Say. Rep. 87.

^d 2 Salk. 515. R. T. 5 & 6

^z *Prax. utr. banci*, 37. R.

Geo. II. (b). 1 Wils. 29.

T. 5 & 6 Geo. II. (b).

^e 2 Bur. 781

^a 2 Str. 906. 1181. 1 Wils.

him to abide by it, or plead some other plea, peremptorily, on the morrow; or, if it be towards the end of the term, (that the plaintiff may have sufficient time to give notice of trial) the court will order the defendant, if he will not abide by his plea, to plead another *instantly*, provided always that the time allowed by the common rule to plead be expired^f: And the practice is the same, with regard to frivolous demurrers^g.

When the defendant is ruled to abide by his plea, he either abides by it^h, or pleads another: In the former case, he may afterwards demur to the plaintiff's replicationⁱ; in the latter, he can only plead the general issue^k, to which however he may add a notice of set-off^l. And, whether he be ruled to abide by his plea or not, it is a general rule, that the defendant cannot waive a special plea or special demurrer, but in order to plead the general issue^m; though leave has been given under circumstances, for the defendant to *add* a plea after issue joined, and even after two terms have elapsed since he first pleadedⁿ.

^f 2 Salk. 515. R. T. 5 & 6

Geo. II. (b).

^g *Id. ibid.*

^h 2 Str. 1234.

ⁱ *Id.* 1185.

^k 1 T. R. 693.

^l *Id.* 694. *in notis.*

^m 2 Str. 960. 1 Wils. 29.

ⁿ 1 Wils. 223.

CHAPTER XXIX.

Of REPLICATIONS, *and other* SUBSEQUENT
PLEADINGS.

WHEN the defendant has put in his plea, he may rule the plaintiff to reply ^a, by obtaining a rule from the master, on the back of the plea; which is entered with the clerk of the rules, and a copy served on the plaintiff's attorney. This rule may be given at any time in term, or within sixteen days afterwards; but if not given till four terms have elapsed after plea pleaded, the plaintiff must have a term's previous notice ^b of the defendant's intention to give it, unless the cause hath been stayed by injunction or privilege ^c. The notice in such case must be given before the essoign-day of the term ^d; and it is usual to give the rule, on the day after the term is expired ^e. The rule to reply expires in four days exclusive after service; and *Sunday*, or any holiday on which the court does not sit, or the office is not open, if it be not the last, is to be

^a Append. Chap. XXIX.

§ 1.

^b *Id.* § 2.^c R. T. 5 & 6 Geo. II. (*b*).^d 2 Str. 1164.^e Imp. K. B. 287.

be accounted a day with the rule ^f. If the plaintiff be not ready to reply, within the time limited by the rule, he may take out a summons, and obtain an order, for further time.

Within the time limited by the rule to reply, or order for further time, the plaintiff either admits the plea to be well founded, in point of fact as well as law, and *discontinues* his action, enters a *nolle prosequi*, or *cassetur billa vel breve*, or in an action against an executor or administrator, takes judgment of assets *in futuro*, &c.; or admitting the fact, he denies the law by a *demurrer*; or admitting the law, he denies the fact, or confesses and avoids it, or concludes the defendant by matter of estoppel.

If the plaintiff perceive that he cannot maintain his action, it is usual for him to take out a rule for leave to discontinue. *Discontinuance* in a civil suit, is either of process or of pleading: The former, before judgment, is the act of the clerk, but after judgment, it is the act of the court ^g; the latter, of which something has been already said ^h, is the act of the party. The process, or proceedings in a suit, should be regularly continued from term to term, or from one day to another in the same term ⁱ, between the commencement of the suit and

^f R. T. 1 Geo. II. (a).

Comyns, 419.

^g Cart. 51. 1 Salk. 177.

^h *Ante*, 617, 18.

ⁱ Wils. 40. *Id.* 303. cites

ⁱ 1 Str. 492. 1 Wils. 40.

and final judgment; and if there be any lapse, or want of continuance, that is not aided, the parties are out of court, and the plaintiff must begin *de novo*. Before declaration, there is, properly speaking, no continuance^k; though we have seen^l, that the parties by consent might have obtained a day before declaration, which was called a *dies datus prece partium*: After declaration, and before issue joined, the proceedings are continued by *imparlance*^m; after issue joined, and before verdict, by *vicecomes non misit breve*ⁿ; and after verdict or demurrer, by *curia advisari vult*^o. In this court, the practice is never to enter continuances, till the plea-roll is made up, though the declaration be of four or five terms standing^p: And after plea pleaded, though the plaintiff have day to reply for several terms, yet no mention need be made on the roll, of any imparlance or continuance^q. After judgment by default, and writ of inquiry awarded, there is no subsequent continuance between the parties, in the Common Pleas^r: but in this court it is otherwise. Continuances may be entered at any time^s: And in a late case, the court

^k Gilb. C. P. 40.^l *Ante*, 363.^m Append. Chap. XXXI.

§ 2. 4.

ⁿ *Id.* § 32. 34.^o *Id.* § 26. Chap. XXXIX.

§ 39.

^p 1 Salk. 179. 2 Ld. Raym.

872. S. C.

^q 5 Co. 75.^r 11 Co. 6. b. Yelv. 97.¹ Rol. Abr. 486.^s *Ante*, 92.

court granted leave to enter continuances after verdict, in order to arrive at the justice of the case^t. The want of a continuance is aided by the appearance of the parties^u: And as a discontinuance can never be objected *pendente placito*^v, so after judgment, it is cured by the statute of jeofails^w. It has ever been holden, that a continuance may be added, after judgment in a *penal* action^x; but then, there must be something to amend by^y.

A rule to discontinue^z may be had, either before or after declaration^a; and it is usually granted upon payment of costs^b. An executor or administrator is liable to costs upon a discontinuance, where he has knowingly brought a wrong action^c: But where that is not the case, he may have leave to discontinue, without paying costs^d. The rule to discontinue is a side-bar rule, and may be had, as a matter of course, from the clerk of the rules, at any time before trial or inquiry^e; and leave has been given to discontinue after argument, and before

^t 7 T. R. 618.

^y 1 Wils. 303.

^u 1 Wils. 40. 6 T. R. 255.

^z Append. Chap. XXIX.

^v Cro. Jac. 211.

§ 3.

^w 32 Hen. VIII. c. 30. Cro.

^a R. M. 10 Geo. II. (b).

Eliz. 489. Cro. Jac. 528. 3

^b Comb. 299.

Lev. 374. 6 T. R. 255.

^c Cas. Pr. C. B. 79. 3 Bur.

^x 2 Str. 1227. 1 Wils. 125.

1451. 1 Blac. Rep. 451. S. C.

S. C. in *Cam. Scac.* 6 T. R.

^d 2 Str. 871. 4 Bur. 1927.

255. 618.

^e 1 Salk. 178.

fore judgment on demurrer^f: And even after a *special* verdict, the plaintiff may discontinue, by leave of the court, because that is not complete and final; but in this case it is a great favour^g: And it is never granted after a *general* verdict^h, or writ of inquiry executed and returnedⁱ, or after a peremptory rule for judgment on demurrer^j.

Upon a rule to discontinue, the plaintiff is to get an appointment from the master, to tax the costs, and serve a copy of it on the defendant's attorney; it having been holden, that the service of a rule to discontinue, without an appointment to tax the costs, is not of itself a discontinuance of the action^k. The costs being taxed, are to be forthwith paid; otherwise the plaintiff may proceed in the action, for the rule being conditional, is no stay of proceedings: And it has been holden, that for the non-payment of these costs, the defendant is not liable to an attachment^l. In *replevin*, the avowant, though an actor, cannot have a rule to discontinue^m; and where the rule is obtained by unfair practice, the court will discharge itⁿ.



A *nolle prosequi* is an acknowledgment or agreement by the plaintiff, that he will not further prosecute

^f 3 Lev. 440. 1 Str. 76. 116.

^g 1 Salk. 178.

^h *Id. ibid.*

ⁱ Carth. 86.

^j 1 Salk. 179

^k 6 T. R. 765.

^l 7 T. R. 6.

^m 1 Str. 112.

ⁿ 4 Bur. 2502.

secute his suit, as to the whole or a part of the cause of action; or where there are several defendants, against some or one of them^o.

On a plea of *coverture*, &c. if the plaintiff cannot answer it, he may enter a *nolle prosequi*, as to the whole cause of action; but the defendant, in such case, is entitled to costs, under the 8 *Eliz.* c. 2. § 2.^p So if the defendant demur to one of several counts of a declaration, the plaintiff may, on payment of costs of the demurrer, enter a *nolle prosequi*, as to that count which is demurred to, and proceed to trial upon the other counts^q; or if he join in demurrer and obtain judgment, he may enter a *nolle prosequi* as to the issue, and proceed to a writ of inquiry on the demurrer^r. But after a demurrer for *misjoinder*, the plaintiff cannot cure it, by entering a *nolle prosequi*^s. And if there be a demurrer to a declaration, consisting of two counts, against two defendants, because one of them was not named in the last count, the plaintiff cannot enter a *nolle prosequi* on that count, and proceed on the other^t. So, where the plaintiff declares on a joint contract against two defendants, and one of them

^o Cro. Car. 239. 243. 2 3 T. R. 511.

Rol. Abr. 100. and for the nature and effect of a *nolle prosequi*, see 8 Co. 58. Cro. p 3 T. R. 511.

q 2 Salk. 456.

r 1 Salk. 219. 2 Salk. 456

1 Str. 532. 574.

s 1 H. Blac. 108.

t 4 T. R. 360.

1 Saund. 207. in notis. 1 Ld. Raym. 598, &c. 1 Wils. 90.

them pleads infancy, the plaintiff cannot enter a *nolle prosequi* as to him, and proceed against the other defendant in that action; but should commence a new action against the adult defendant only ^u.

If there be a *demurrer* to part, and an issue upon other part, and the plaintiff prevail on the demurrer, it was in one case holden, that without a *nolle prosequi* as to the issue, he cannot have a writ of inquiry on the demurrer; because on the trial of the issue, the same jury will ascertain the damages, for that part which is demurred to^v. But in a subsequent case^w, where the declaration consisted of four counts, to three of which there was a plea of *non assumpsit*, and a demurrer to the fourth; and after judgment on the demurrer, the plaintiff took out a writ of inquiry, and executed it; this was moved to be set aside, there being no *nolle prosequi* on the roll; and it was insisted, that the plaintiff ought to take out a *venire*, as well to try the issue, as to inquire of the damages upon the demurrer: *Sed per Curiam*, “ that is indeed the course, where the issues are carried down to trial, before the demurrer is determined, and in that case the jury give contingent damages; but here the demurrer being determined, and the plaintiff being able to recover

^u 3 Esp. Cas. *N. Pri.* 76. ^w 1 Str. 532. 8 Mod. 108.

^v 1. Salk. 219. 12 Mod. 558. S. C. and see 7 T. R. 473.

recover all he goes for upon the fourth count, there is no reason why we should force him to carry down the record to *nisi prius*: and as to the want of a *nolle prosequi* upon the roll, he may supply that, when he comes to enter the final judgment; if not, the defendant will have the advantage of it upon a writ of error: The judgment upon the inquiry must stand.”

In *trespass*, or other action for a wrong, against several defendants, the plaintiff may, at any time before final judgment, enter a *nolle prosequi* as to one defendant, and proceed against the others ^x: And so in *assumpsit*, or other action upon contract, against several defendants, one of whom pleads bankruptcy, or other matter in his personal discharge, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the other defendants ^y. But a *nolle prosequi* cannot be entered as to one defendant, after final judgment against the others ^z: And it seems that in *assumpsit*, or other action upon contract, against several defendants, the plaintiff cannot enter a *nolle prosequi* as to one, unless it be for some matter operating in his *personal* discharge, without releasing the others ^a. In entering a *nolle prosequi*, the plaintiff need not be amerced *pro falso clamore*:

^x Hob. 70. Cro. Car. 239.
243. 2 Rol. Abr. 100. 2 Salk.
455, 6, 7. 3 Salk. 244, 5.
1 Wils. 306.

^y 1 Wils. 89.

^z 2 Salk. 455.

^a 1 Wils. 89.

clamore: but it is sufficient, that the defendant be put without day ^b.

On a plea in *abatement*, if the plaintiff cannot deny the truth of the matter alleged, and it is sufficient in law to quash the bill or writ, he may enter a *cassetur billa vel breve* ^c; or in other words, pray that the bill or writ may be quashed, to the intent that he may exhibit, or sue out a better bill or writ, against the defendant: And upon such entry, the defendant is not entitled to costs.

In an action against an *executor* or *administrator*, if the defendant plead *plene administravit*, and it cannot be proved that he has assets in hand, the plaintiff may confess the plea, and take judgment of assets *in futuro*; which is an interlocutory or final judgment, according to the nature of the action: and if it be only interlocutory, there must be a writ of inquiry to complete it. So, in an action against an insolvent debtor or fugitive, whose future effects remain liable to the payment of his debts, the plaintiff may take judgment for his demand, to be levied of those effects ^d.



A replication, denying the truth of the plea, is either in denial of the whole, or a part of it; and

^b 1 Str. 574.

§ 69.

^c Append. Chap. XXXIX.

^d 1 T. R. 80.

and such denial is either direct and immediate, or consequential to, and preceded by an inducement: the latter mode of denial is called a *traverse*.

When the defendant's plea doth consist merely of matter of fact, triable by the country, in excuse or justification of the injury complained of, as where the defendant, in trespass and assault, pleads *son assault demesne*, or justifies in an action for words, there the plaintiff may reply generally, that the defendant committed the injury of his own wrong, and without any such cause as the defendant had alleged; which puts the whole matter of the plea in issue, and is called a replication *de injuriâ suâ propriâ, absque tali causâ*^e. But where the plea consists of matter of record, as well as matter of fact, or the defendant claims, in his own right or as servant to another, any interest in the land, or any common or rent issuing out of the land, or a way or passage over it, there *de injuriâ*, &c. generally is not a good replication^e; but the plaintiff must either deny the matter of record, or traverse the title specially, or admitting the matter of record or title, he must reply, that the defendant committed the injury of his own wrong, and without the *residue* of the cause alleged by the defendant. So if the defendant, without claiming any

^e *Crogat's case*, 8 Co. 67.

any interest in the land, justify under an authority derived *immediately* or *mediately* from the plaintiff, or by authority of law, *de injuriâ*, &c. generally is not a good replication.

Where there is an affirmative and negative, either in express words or by necessary implication^f, or a complete confession and avoidance, a traverse is unnecessary and superfluous. But where there are two affirmatives, which do not impliedly negative each other, or a confession and avoidance by argument only, it is necessary to add a traverse. A *traverse* is a denial of the whole, or most material point of the adversary's pleading, or if there are several points equally material, of one of them; and it should consist of some matter of fact, triable by the country, either expressly alleged, or necessarily implied. Matter of inducement therefore, or conveyance to the action, a mere suggestion, surmise or supposal, the time and place, or what is alleged under a *scilicet*, if immaterial, is not allowed to be traversed; nor matter of law, or mere legal inference; matter of intention, which is not triable, as the *sciens* in an action of deceit; matter of record, which is not triable by the country; or any other matter, which is not expressly alleged, or necessarily implied. But matter of inducement, &c. is traversable, if material.

Every

^f 2 Str. 1177. 1 Wils. 6. S. C.

Every traverse ought to have a proper inducement; and if that be bad, the traverse is insufficient: But the inducement to a traverse does not require much certainty, though the traverse itself should be certain, and neither too large nor too narrow, that is, it should deny so much as is material, and no more. The proper words for beginning a traverse, are *absque hoc*; but any words tantamount are sufficient, as *et non*: And it ought not to conclude to the country, unless it comprise the whole matter of the plea. There cannot be a traverse after a traverse, where the first was apt and material: But it is otherwise, where the first traverse was not to the point of the action, or immaterial. And the king is allowed to take a traverse after a traverse, where his title appears by office, or other matter of record.

The want of a necessary traverse, or a traverse that is unnecessary and superfluous, is merely form, and aided after verdict, on a general demurrer, or by pleading over. A traverse improperly taken is also aided in like manner; as where it is without an inducement, or of an immaterial point, or of one that is not the most material, or too large, or too narrow, or after a former traverse^s.

If

^s For the above rules re- see Com. Dig. tit. *Pleader*,
specting traverses, and the (G), &c.
cases which illustrate them,

If the plaintiff cannot deny the truth of the plea, he may confess and avoid it, or conclude the defendant by matter of estoppel. *Avoidance*, we have seen ^h, is either by matter precedent, which is called an avoidance in law, or by matter subsequent, which is called an avoidance in fact. And in general we may observe, that the qualities of a replication are similar to those of a plea: Like a plea, it should answer the whole matter alleged, and be single ⁱ, certain, direct and positive, triable, and capable of proof. The only additional quality, required in a replication, is that it be consistent with, and do not depart from the declaration.

Departure

^h *Ante*, 591.

ⁱ Though a replication must not be double, yet it may contain several distinct answers to the plea. Thus, at common law, where the defendant in *assumpsit* pleads infancy, to a declaration consisting of several counts, the plaintiff may reply, as to part of his demand, that it was for necessities, to other part, that the defendant was of full age at the time of the contract, and to other part, that he confirmed it after he came of age. So if an executor or administrator plead several judgments outstanding, and no assets *ultra*, the plaintiff may reply, as to one of the

judgments, *nul tiel record*, to another, that it was obtained or kept on foot by fraud, and to the rest, assets. In an action of *debt* on bond, conditioned for the performance of covenants, the plaintiff may, by the statute 8 & 9 W. III. c. 11. § 8. assign several breaches in his replication. And to a plea of set-off, consisting of several demands, upon judgment or recognisance and simple contract, the plaintiff in his replication may give several answers, as to the judgment or recognisance, *nul tiel record*, and to the simple contract, that he was not indebted, or the statute of limitations.

Departure in pleading, is when a man quits or departs from the case or defence which he has first made, and has recourse to another; or, in other words, when the replication or rejoinder contains matter, not pursuant to the declaration or plea, and which does not support and fortify it ^j. Thus, if the declaration be founded on the common-law, the plaintiff in his replication cannot maintain it by a special custom, or act of parliament ^k. So, in an action of *debt* on an arbitration-bond, if the defendant plead no award made, and the plaintiff, in his replication, set out an award, and assign a breach, the defendant cannot rejoin that the award was not tendered ^l, or is void ^m, or that the defendant hath performed, or been *ready* to perform it ⁿ. So in an action of *debt* on bond, conditioned for the payment of an annuity, if the defendant plead no such memorial as the statute requires, to which the plaintiff replies that there was a memorial, which contained the names of the parties, &c. and the consideration for which the annuity was granted, and the defendant rejoins that the consideration is untruly alleged in the memorial to have been paid to both obligors, for that one of them did

^j Co. Lit. 304. a. 2 Wils. 188. S. C. 3 Salk. 123.

98. ^m 1 Lev. 85. 127. 133.

^k Co. Lit. 304. a. 1 Lev. 1 Wils. 122.

81. 3 Lev. 48. ⁿ 1 Sid. 10.

^l 1 Lev. 300. 2 Saund.

did not receive any part of it; this rejoinder is bad, as being a departure from the plea^o. So in an action of *debt* on bond, conditioned for the performance of covenants, if the defendant plead performance, and the plaintiff reply and assign a breach, the defendant cannot rejoin any matter in excuse of performance^p. But where the rejoinder discloses new matter, in explanation or fortification of the bar, it is no departure^q.

Time and place, when material, cannot be departed from; as in an action upon a bond^r or promissory note^s, the plaintiff in his replication cannot vary from the day laid in the declaration. So in an action for a local trespass, he cannot reply that it was committed at a different place. But where the time laid in the declaration is immaterial, there, if it become necessary by the defendant's plea, the plaintiff in his replication may depart from it; as in trespass^t or trover^u, or upon a general *indebitatus assumpsit*^v, where the time becomes material by the defendant's plea of a release, tender, or the statute of limitations, &c. So in an action for a transitory trespass, where the defendant pleads
a local

^o 4 T. R. 585.

^p Co. Lit. 304. a. 2 Lev. 67.

^q 1 Salk. 221, 2.

^r 2 Wils. 98.

^s 1 Salk. 222. 3 Lev. 348.

^t 1 Str. 22. 2 Str. 806.

^u Co. Lit. 282. a. b. 1 Salk.

222. 2 Ld. Raym. 1015.

^v Cro. Car. 245. 333. 1

Salk. 222.

^w 1 Str. 22. 2 Str. 806. 1

Lev. 110. 1 Keb. 566. 578.

10 Mod. 251. Fort. 375. 1 Bar-

nard. K. B. 54.

a local justification, the plaintiff, in his replication, may vary from the place laid in the declaration ^w. The proper mode of taking advantage of a departure, is by demurrer; for if the defendant, instead of demurring, take issue upon a replication containing a departure, and it be found against him, the court will not arrest the judgment ^x.

But though a departure be not allowable, yet in many actions, and particularly in trespass, the plaintiff, who has alleged in his declaration a general wrong, may in his replication, after an evasive plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh, with all its specific circumstances, in such manner, as clearly to ascertain and identify it, consistently with his general complaint; which is called a *new or novel assignment* ^y.

A new assignment is either as to time, place, or other circumstances. With respect to *time*, when the defendant justifies under a right of common, &c. at particular times, the plaintiff may new-assign the trespass, at other times. So in an action of assault and battery, if the defendant plead *son assault demesne*, and there were in truth two assaults, one of which the defendant can justify, and the other

^w 1 Ld. Raym. 120.

^y 3 Blac. Com. 311.

^x T. Raym. 86.

other not, the plaintiff may new-assign the assault for which he brought his action^z. But it seems that without a new assignment, the plaintiff, on the general replication of *de injuriâ suâ propriâ, absque tali causâ*, would be permitted to give evidence of the assault for which he brought his action, and the defendant must answer it^a.

With respect to the *place*, it is a rule, that if the plaintiff in trespass give it a name by his writ, the defendant cannot vary from that name: but if the writ be only general, *quare clausum fregit*, and the plaintiff give a name in his count, this shall not bind the defendant, but he may give the place another name^b. And it is on all hands agreed, that where the writ and count are both general, the defendant may give the place a name in his plea^c, or he may plead *liberum tenementum* generally, without giving it a name^d. But where the place is made material by the defendant's plea, he must shew

^z 6 Mod. 120. 2 Ld. Raym. 1015.

^a Cro. Car. 514, 15. *Tamen quære*; for in Bul. *Ni. Pri.* p. 17. it is said, that the defendant, in such case, may prove an assault on any day before the action brought; and the plaintiff cannot give in evidence a battery at another day, or at another time on the same day, without a *novel* as-

signment, which must be of a battery on the same day mentioned in the declaration, else it will be a departure. And see 1 Esp. Cas. *Ni. Pri.* 38.

^b *Per Fairfax*, Just. 22 Edw. IV. 17. Willes, 222, &c. 2 Blac. Rep. 1090.

^c Bro. Abr. tit. *Trespass*, pl. 277. 360. 366.

^d *Id.* pl. 153.

shew it with certainty; as in trespass for taking and carrying away the plaintiff's goods in *D*, the defendant pleaded that the *locus in quo* was his freehold, and that he took the goods *damage feasant*, &c. the plaintiff demurred generally, and had judgment; for the action being transitory, there is no *locus in quo* supposed, *D*. being only alleged for a venue, therefore if the defendant will make the place material, it must come on his part to shew the certainty of it^e.

If the defendant say, that the *locus in quo* is six acres in *D*, which are his freehold, and the plaintiff say they are *his* freehold, and in truth the plaintiff and defendant have both six acres there, it was in one case determined, that the defendant cannot give in evidence, that he committed the trespass in his own soil, unless he give a name certain to the six acres; for otherwise, it is said, the plaintiff cannot make a new assignment^f. But in a later case^g, it was determined, that in trespass *quare clausum fregit* in *D*, if the defendant plead *liberum tenementum*, without giving the close a name, and issue be joined thereupon, it is sufficient for the defendant to shew *any* close there that is his freehold; and therefore, in that case, the better way is to make a new assignment.

As

^e 2 Salk. 453. 6 Mod. 117.

S. C.

^f Dyer, 23.

^g 2 Salk. 453. 6 Mod. 119.

S. C. Willes, 223. 7 T. R.

535. *per* Lawrence, Just.

As the plaintiff may new-assign the trespass in a different close, so he may new-assign it in another part of the same close: In the latter case, he ought to allege, in what other part of the close the defendant committed the trespass, as in the *south* or *north* part, so that the difference may be plainly perceived^h. If the defendant justify under a right of way, the plaintiff may either deny the existence of the right claimed by the defendant, or admitting it, he may new-assign the trespass *extra viam*; or, if he be so disposed, he may deny the right, as well as make a new assignment, by saying that he brought his action, not only for the trespass attempted to be justified, but also for the other trespass *extra viam*. And where the defendant justifies under a right of common of pasture or turbary, &c. the plaintiff may state the trespass to have been committed on other occasions, and for other purposes, than those mentioned in the plea.

A new assignment, being in nature of a new declaration, should be equally certain; and the defendant may answer it in the same way, either by pleading the general issue of not guilty, or a special justification. But, in answer to a new assignment at a different place, he cannot say that
the

^h Bro. Abr. tit. *Trespass*. ⁱ *Id.* pl. 168. §59.
pl. 203.

the places mentioned in the plea and new assignment are the same^j; for by new-assigning, the plaintiff admits the truth of the plea, and is estopped from giving any evidence in the place stated therein, so that if the places are in truth the same, the defendant may take advantage of it, on the general issue of not guilty. Neither can the defendant justify at a different place, and traverse the place mentioned in the new assignment^k.

Where a replication denies the whole substance of the defendant's plea, there the plaintiff ought to tender an issue, and conclude to the country^l; and it matters not whether the replication, in such case, be with or without a traverse, for where a traverse comprises the whole matter of the plea, the replication may still conclude to the country^m. But where a particular fact is selected and denied, the conclusion seems to depend on the form of the replication: If it be so framed, as simply to deny the fact, without any inducement or traverse, it ought to conclude to the countryⁿ; but the plaintiff is not always obliged to reply in that way, for in some cases

^j Bro. Abr. tit. *Trespass*, pl. 3.

168. Cro. Eliz. 355. 492, 3.

^k Bro. Abr. tit. *Trespass*, pl. 168.

^l 1 Bur. 316. 2 Bur. 1022. Doug. 94. 428. 2 T. R. 442, 3.

^m 1 Salk. 4.

ⁿ 2 T. R. 439. and the cases there cited of *Bush v. Leake*, T. 23 Geo. III. and *Slater v. Carne*, H. 25 Geo. III. accord. *Mulliner v. Wilkes*, E. 23 Geo. III. *semb. contra*.

cases he is allowed, after a proper inducement, to traverse the fact, with an *absque hoc* °; and where a particular fact is so traversed, the replication should conclude to the court, with an averment and prayer of damages, or of the debt and damages ^p. And it is an invariable rule, that wherever new matter is alleged in the replication, it should be concluded with an averment, in order to give the defendant an opportunity of answering it ^q. A new assignment concludes, by averring that the trespass newly assigned is another and different trespass, than that mentioned in the plea; wherefore, inasmuch as the defendant hath not answered the trespass newly assigned, the plaintiff prays judgment, and his damages, &c.

In all cases, where the plea was *entered* in the general issue book, or *delivered* to the plaintiff's attorney, the replication should be *delivered* to the defendant's attorney; but otherwise it should be *filed*, in the office of the clerk of the papers: And unless the replication conclude to the country it should be signed by counsel ^r.

If

° *Fen v. Alston*, cited in 1 Bur. 320, 1. 2 Str. 871. 2 Wils. 113. Barnes, 161. S. C. Doug. 428.

^p Same cases; 1 Bur. 319. 2 T. R. 442, 3.

^q 2 Wils. 65. Doug. 58. 2 T. R. 576.

^r In the Common Pleas, a replication of *nul tiel record* must have a serjeant's hand, 2 Wils. 74. And in that court, we have seen, a tender of issue must be signed, but a joinder in issue need not. *Ante*, 622. (*h*).

If the plaintiff reply, without joining issue, the defendant may be called upon to *rejoin*; or if there be a new assignment, he may be ruled to *plead* thereto, in like manner as to the original declaration. After a rejoinder, if the parties are not yet at issue, the plaintiff must *sur-rejoin*, the defendant *rebut*, and the plaintiff *sur-rebut*, &c. till issue is joined. The rule for these purposes is given by the master, in like manner as the rule to reply; and if the plaintiff do not reply, sur-rejoin, or sur-rebut, within the time limited by the rule, or order for further time, the defendant may sign a judgment of *non pros*. And it is not necessary for him to demand a replication, &c. the service of the copy of the rule being deemed a demand of itself. The judgment of *non pros* is a final judgment, and signed on a double half-crown stamp; on which the defendant may tax his costs, and take out execution^s. If the defendant, on the other hand, neglect to rejoin or rebut, when called upon for that purpose, the plaintiff may strike out the previous pleadings, and sign judgment by default, as for want of a plea^t.

^s Imp. K. B. 471.

^t 5 T. R. 152.

CHAPTER XXX.

Of DEMURRERS and AMENDMENT.

A DEMURRER admits the facts, and refers the law arising thereon to the judgment of the court ^a. And it is either to the whole or part of a declaration, or to the plea, replication, &c. When there are several counts in a declaration, some of which are good in point of law, and the rest bad, the defendant can only demur to the latter; for if he were to demur generally to the whole declaration, the court would give judgment against him ^b. But if a plea or replication, which is entire, be bad in part, it is bad for the whole ^c.

Demurrers are *general* or *special* ^d; the former are to the *substance*, the latter to the *form* of pleading. Thus, if a defective title be alleged, it is a fault in substance, for which the party may demur generally; but if a title be defectively stated, it is only a fault in form, which must be specially assigned for cause of demurrer. Of the same nature is *duplicity*: And it is not sufficient to say that the

^a Co. Lit. 71. b. 5 Mod. 132. 312. 1 T. R. 40. 3 T. R.

^b 1 Saund. 286. 2 Saund. 374.

380. 1 Wils. 248.

^d Co. Lit. 72. a.

2 Saund. 124. 1 Salk.

the pleading is double, or contains two matters, but the party demurring must specially shew wherein the duplicity consists ^e.

At common law, there were special demurrers, but they were never necessary except in cases of duplicity, and therefore were seldom practised; for as the law was then taken to be, upon a special demurrer, the party could take advantage of no other defect in the pleadings, but of that which was specially assigned for cause of his demurrer: But upon a general demurrer, he might take advantage of all manner of defects, that of duplicity only excepted; and there was no inconvenience in such practice, for the pleadings being at bar *vivâ voce*, and the exceptions taken *ore tenus*, the causes of demurrer were as well known upon a general demurrer, as upon a special one ^f.

Afterwards, when the practice of pleading at bar was altered, this public inconvenience followed from the use of general demurrers, that the parties went on to argument, without knowing what they were to argue; and this was the occasion of making the statute 27 *Eliz.* c. 5., by which it is enacted,
 “ that after demurrer joined and entered in any
 “ action or suit, in any court of record, the judges
 “ shall proceed and give judgment, according as
 “ the

^e R. M. 1654. § 17. 1 Salk. Hardw. 167.

219. Willes, 220. Cas. temp. ^f 3 Salk. 122

“ the very right of the cause and matter in law
 “ shall appear to them, without regarding any im-
 “ perfection, defect, or want of form, in any writ,
 “ return, plaint, declaration, or other pleading, pro-
 “ cess, or course of proceeding whatsoever, ex-
 “ cept those only which the party demurring shall
 “ specially and particularly set down and express,
 “ together with his demurrer.” This statute, by
 making known the causes of demurrer, was so far
 restorative of the common law^g; and as a general
 demurrer before did confess all matters formally
 pleaded, so by this statute, whenever the right suf-
 ficiently appeared to the court, it confessed all mat-
 ters, though pleaded informally^h.

But there were still many defects and imperfec-
 tions, which were not aided as form upon a gene-
 ral demurrer; to remedy which, it was enacted, by
 the stat. 4 *Ann.* c. 16. “ that no advantage or excep-
 “ tion shall be taken of or for an immaterial tra-
 “ verse, the default of entering pledges upon any
 “ bill or declaration, the default of alleging a *pro-*
 “ *fert in curiâ* of any bond, bill, indenture, or
 “ other deed mentioned in the declaration or other
 “ pleading, or of letters testamentary or letters of
 “ administration, the omission of *vi et armis* or *con-*
 “ *tra pacem*, the want of averment of *hoc paratus est*
 “ *verificare*, or *hoc paratus est verificare per re-*
 “ *cordum*,

^g 3 Salk. 122.

^h Hob. 238

“ *cordum*, or not alleging *prout patet per recordum*; but the court shall give judgment, according to the very right of the cause, without regarding any such imperfections, omissions, and defects, or any other matter of like nature, except the same shall be specially and particularly set down, and shewn for cause of demurrer; notwithstanding the same might have heretofore been taken to be matter of substance, and not aided by the statute of Queen *Elizabeth*, so as sufficient matter appear in the pleadings, upon which the court may give judgment, according to the very right of the cause.” Since the making of these statutes, the party, on a general demurrer, can only take advantage of defects in substance; and therefore, if the defects be not clearly of that nature, it is safest to demur specially, in which case he may not only take advantage of such defects, but also of any others that are specially set down.

All demurrers, whether general or special, must be signed by counselⁱ; and general demurrers to the declaration are delivered, on treble-penny stamp paper, to the plaintiff’s attorney; but special demurrers, or general demurrers after special pleas,

ⁱ So in the Common Pleas, all demurrers must be signed by a serjeant. *Douglas v. Child*, E. 33 Geo. III. C. B. and in that court, a joinder in demurrer must have a serjeant’s hand. 2 Bos. & Pul. 376. and see 3 Bos. & Pul. 171. *in notis*.

pleas, are filed in the office of the clerk of the papers, who makes copies of them. The defendant, we may remember, cannot waive a general demurrer to the declaration; but a special one may be waived, after the book is made up, unless the defendant has been previously ruled, and elected to abide by it.



When either party demurs, the other, in due time, joins in demurrer and proceeds to argument, amends, discontinues, or enters a *nolle prosequi*^j.

Amendments are either at common law or by statute^k. At common law, there was very little room for amendments; for, according to *Britton*, the judges were to record the *parols*, or pleadings, deduced before them in judgment; but they were not to erase their records, nor amend them, nor record against their enrolment^l, &c. All mistakes, however, were amendable at common law, during the same term^m; and afterwards, an amendment was in some instances permitted, as in the recital of a writ, or entry of an *essoign* or continuancesⁿ, &c. So at common law, when the pleadings were

ore

^j Co. Lit. 72. a. R. M. 107.

1654. § 17.

^m 3 Co. 157. Gilb. C. P.

^k 1 Str. 137.

108.

^l 4 Inst. 255. Gilb. C. P.

ⁿ Gilb. C. P. 108, 9.

ore tenus at the bar of the court, if any error was perceived in them, it was presently amended^o. Afterwards, when the pleadings came to be in paper, it was thought but reasonable that the parties should have the like indulgence^p. And hence it is now settled^q, that whilst the pleadings are in paper, and before they are entered on record, the court on motion, or a judge at chambers, will amend the declaration^r, plea^s, replication^t, &c. in form or in substance, on proper and equitable terms.

The declaration may be amended, in form or in substance^u; and it may be so amended, even after a plea in abatement^v, or of *nul tiel record*^w. And leave has been granted, upon the application of the

^o 10 Mod. 88. 1 Str. 11.

^p 2 Salk. 520. Gilb. C. P. 114, 15.

^q 1 Salk. 47. 3 Salk. 31.

^r 1 Wils. 7.

^s *Id.* 223.

^t *Id.* 76.

^u As to an amendment of the declaration, by altering the *venue*, see 2 Barnard. K. B. 153. 2 Str. 1162. 1202. 1 Wils. 173. Say. Rep. 150. 294. 2 Bur. 1098.

^v 1 Salk. 50. 1 Ld. Raym. 669. S. C. 1 Str. 11. 2 Str. 739. 2 Ld. Raym. 1472. S. C. Cas. *temp.* Hardw. 44. but see 1 Salk. 50. 2 Ld. Raym

859. S. C. *Id.* 1307. *contra*.

In the case of *Owens v. Dubois*, T. 38 Geo. III. the plaintiff was allowed to amend his declaration, on payment of costs, by altering the defendant's name, after a plea of *misnomer* in abatement, and even after two terms had elapsed, and notwithstanding the defendant was in custody. See 7 T. R. 698.

^w 1 Wils. 87. 7 T. R. 447. (*d*). but see 1 Salk. 52. 6 Mod. 263. 310. S. C. *semb. contra*. See also 2 Bur. 901.

the plaintiff, to amend the declaration after verdict, by increasing the damages laid, according to the truth of the case, as found by the jury; the former verdict being at the same time set aside, and a new trial granted, to enable the defendant to make his defence to the demand so enlarged^x. But the plaintiff was not formerly allowed to add a new count to his declaration, under pretence of amending it, after plea pleaded, or after the end of the second term from the return of the writ^y: And a new right of action was considered, in this respect, as a new count^z. Yet, where the plaintiffs declared as executors, on a promise to their testator, and issue was joined on a plea of the statute of limitations; the court, after two terms, permitted the plaintiffs to amend, by laying the promise to have been made to themselves^a: But the amendment in this case was under particular circumstances; and if it had not been allowed, the action would have been lost, by the running of the statute of limitations^b. By the modern practice however, it seems that the plaintiff may amend his declaration, by adding a new count, after plea pleaded, and even after two terms have elapsed, on payment of costs.

Before

^x 7 T. R. 132.

^a 2 Str. 890. Fitzgib. 198.

^y R. M. 10 Geo. II. (b). 1 Barnard. K. B. 408. 418.

¹ Wils. 149. Say. Rep. 97. S. C.

151. 234.

^b 1 Wils. 149. Say. Rep.

^z 1 Wils. 149. Say. Rep. 235, 6

234.

Before plea, there are no costs payable upon amending the declaration, except the costs of the application; and the declaration may be amended, in matter of *form*, after the general issue pleaded, and before entry, without paying costs, or giving an imparlance ^c: But if the amendment be in matter of *substance*, or after the general issue is entered ^d, or a special plea pleaded ^e, the plaintiff must pay costs or give an imparlance, at the election of the *defendant*. On amending the declaration, after plea pleaded, the defendant is at liberty to plead *de novo*, and has two days allowed him for that purpose, after the amendment made, and payment of costs ^f; and if a rule to plead be entered the same term the amendment is made, though before such amendment, it is sufficient; otherwise a new rule to plead must be entered ^f.

The reason of not permitting a new count to be added, or right of action alleged, after the end of the second term, was that the plaintiff was obliged to declare within two terms; and a new count or right of action was considered as a new declaration ^g. But this reason is not applicable to

^c R. M. 10 Geo. II. reg. 2. (b). R. T. 5 & 6 Geo. II. (b). R. M. 10 Geo. II. reg. 2.

^d *Id.* Sty. P. R. 20. 2 Str. 950. but see R. M. 1654. § 13. (b). *Yeates v. Edmonds*, T. 35 Geo. III. and see 8 T. R. 87.

^e 2 Str. 890. Lofft, 155.

^g 1 Wils. 223.

^f 1 Salk. 517, 518. 520.

to pleas or replications, &c. which may be amended at any time, so long as they are in paper: Thus, where the defendant in *trespass* pleaded two pleas, in *Hilary* term; and in *Trinity* term, after issue joined, obtained a rule to shew cause why he should not have leave to amend his two pleas, and to add a third plea; the rule was made absolute, upon payment of costs^h. In like manner, the plaintiff has been allowed to amend, by withdrawing his replication, and replying *de novo*, after a lapse of many termsⁱ. And in one case, the plaintiff had leave to amend his replication, where issue had been joined upon it, and the cause entered at the assizes, and made a *remanet* for defect of jurors^k.

But where to a plea of specialties outstanding, in an action on simple contract against an executrix, the plaintiffs replied *assets ultra*, which was found for them, but the verdict set aside, the court refused to give them leave to alter their replication, and reply *fraud*^l; for besides that there had been a trial, it might have been dangerous to permit the alteration; because the defendant, on the former issue, might have paid away *assets*, as knowing the replication could not affect her. So where the plaintiff had been nonsuited, upon a general replication, “ that the
cause

^h 1 Wils. 223.

^k Say. Rep. 285.

ⁱ Say. Rep. 172. 2 Bur.

^l 2 Str. 1002.

cause of action arose within six years," the court refused to set aside the nonsuit, and to give the plaintiff leave to reply *de novo*, "that the writ of *latitat* issued within the six years^m."

After a *demurrer*, the court would not formerly permit an amendment to be made, without the consent of the adverse partyⁿ. But of late years, the court have not observed the same strictness as formerly, with regard to amendments^o; and it is much better for the parties that they should not. Hence it is now settled, that after a demurrer, or joinder in demurrer, either party is at liberty to amend, as a matter of course, whilst the proceedings are in paper^p: Indeed, the very intent of requiring mistakes in point of form to be shewn for cause of demurrer, was to give the party an opportunity of amending^q. And even where the proceedings are entered on record^r, and the demurrer has been argued^s, the court will give leave to amend, where the justice of the case

^m 5 Bur. 2692, 3.

^s Saund. 402. 2 Str. 735.

ⁿ 1 Ld. Raym. 310. *Id.* 668. 1 Salk. 50. S. C. 1 Ld. Raym. 679. S. P. but see *Cas. temp. Hardw.* 171.

954. 976. *Cas. temp. Hardw.* 42. S. C. 1 Bur. 321, 2. Doug. 330. 620. 1 East, 372.

^o 2 Bur. 756.

Barnes, 9. 21. 25. But after

^p 2 Salk. 520. Gilb. C. P. 114, 15.

the court had given their opinion on the argument, an amendment was denied. 1

^q 2 Str. 846.

East, 391. and see 2 Bos. &

^r *Id. ibid.* 1 Barnard. K. B. 213. 220. S. C.

Pul. 482. 3 Bos. & Pul. 11, 12.

case requires it, and there is any thing to amend by. The court however will always take care, that if one party obtain leave to amend, the other party shall not be prejudiced or delayed thereby^t.

Upon similar grounds, the court will sometimes give a party leave to *withdraw* his demurrer, after it has been argued, and to plead or reply *de novo*, in order to let in a trial of the merits^u. Thus, after a demurrer to the defendant's plea had been argued, and the matter stood over for the judgment of the court, a rule was made to shew cause, why the plaintiff should not have leave to withdraw his demurrer, and reply to the plea; which rule, no cause being shewn, was afterwards made absolute^v.

But this is altogether discretionary in the court^w. Therefore where, to an action of *debt* upon a bail-bond, the defendant pleaded there was no bill of *Middlesex*, and the plaintiff demurred, the court, after delivering their opinion in favour of the defendant, refused to give the plaintiff leave to withdraw his demurrer, and amend^x: And by *Wright*, Just. "It is not usual to amend, after a demurrer has been argued, and the opinion of the court

^t 2 Bur. 756. but see 1 East, 372. where the plaintiff had leave to amend a replication to a *sham* plea, after argument, without paying costs.

^u Doug. 385. 452.

^v Say. Rep. 316.

^w 1 East, 135. (a).

^x Say. Rep. 116, 17

court is known: And it is certainly improper to give leave in the present case, it being an action against bail, whom the court are always inclined to favour." So where the defendant rejoined to several replications in *trespass*, and demurred to others, and a verdict was found for him upon the issues in fact, and contingent damages assessed upon the demurrers, which were afterwards overruled; the court refused to let the defendant withdraw his demurrers, and plead to issue^y: And by *Denison*, Just. "Where the demurrer is first argued, before any trial of the issues, the court will give leave to amend; as in the case of *Giddins v. Giddins*^z: But this is an attempt to amend issues in law, after a verdict has been found on the issues in fact, and contingent damages assessed; of which there never was an instance. And we do not know where it would end; nor how the cause could be again carried down to trial. The court cannot help seeing that this is upon record: Here are verdicts, and contingent damages found. The cases of amendment cited are where the whole is supposed to be in paper; or else the court could not have done it. We have no authority to do this, after it is plainly upon record."

Whilst the proceedings are *in paper*, the amendment is at common law, and not within any of the

^y 1 Bur. 321, 2.

^z Say. Rep. 316.

the statutes of amendments, which relate only to proceedings of record^a. And there is no difference, as to the doctrine of amending at common law, between *civil* and *criminal* cases^b; nor between *penal* and other actions^c. Thus, in a *qui tam* action for usury, the plaintiff was permitted to amend his declaration, by altering the date of a note, after issue joined and entered on the roll, and after many terms had elapsed since the commencement of the action^d. A similar amendment was permitted, in a subsequent case, after the record had been made up for trial, and withdrawn upon discovery of the mistake^e. And in general it seems, that where there has been no unnecessary delay, on the part of the plaintiff, the court will give him leave to amend his declaration in a penal action, even after the time allowed for bringing a new one is expired^f. But where the plaintiff in such an action has been guilty of any unnecessary delay in prosecuting his suit, the court in their discretion will not permit amendments to be made in the declaration, though the pleadings are still in paper^g. And there is said to be no instance, in which the court have given leave to amend, as to the

^a 1 Salk. 47. 3 Salk. 31.

^b 1 Salk. 51. 2 Ld. Raym. 1068. 6 Mod. 285. S. C.

^c 1 Str. 137. 2 Str. 1227.

^d 1 Wils. 256. 1 Bur. 402.

^e 2 Bur. 1098. 9

^e 5 Bur. 2833, 4: and see *Tailleur, qui tam, v. Cocks*, T. 22 Geo. III. 6 T. R. 173.

^f 6 T. R. 543. 7 T. R. 55.

^g 2 T. R. 707. 6 T. R. 171.

8 T. R. 30.

the parties to the suit, in a *qui tam* action, after demurrer^h.

When the proceedings are entered on *record*, the court will amend no farther than is allowable by the statutes of amendmentsⁱ. By the first of these statutes, (14 *Ed.* III. stat. 1. c. 6.) it is enacted, that “no process shall be annulled or discontinued, by misprision of the clerk, in writing one syllable or letter too much or too little; but as soon as the mistake is perceived, by challenge of the party, or in other manner, it shall be amended in due form, without giving advantage to the party that challengeth the same, because of such misprision.” The judges construed this statute so favourably for suitors, that they extended it to a *word*^j. And by the 9 *Hen.* V. stat. 1. c. 4. it is declared, that they shall have the same power, as well *after* as *before* judgment, so long as the record and process are before them. This statute is confirmed and made perpetual by 4 *Hen.* VI. c. 3. with a proviso, that it shall not extend to process of outlawry, &c. By the 8 *Hen.* VI. c. 12. the justices are farther empowered to examine and amend what they shall think, in their discretion, to be the misprision of their clerks, in any record, process, word, plea, warrant

^h *Per Buller*, Just. 4 T. R. Gilb. C. P. 114, 15.
228.

^j 8 Co. 157. a.

ⁱ 1 Salk. 47. 3 Salk. 31.

warrant of attorney, writ, panel, or return: And by the 8 *Hen. VI. c. 15.* they may amend the misprisions of their clerks and other officers, as sheriffs, coroners, &c. in any record, process, or return before them, by error or otherwise, in writing a letter or syllable too much or too little. These are, properly speaking, the only statutes of *amendments*^k; and they do not extend to *criminal* cases, or *penal* actions^l; nor, as it should seem, to process in inferior courts^m.

In order to amend upon these statutes, it is a general rule, that there must be something to amend by. It has however been determined, in compliance with this rule, that the original writⁿ or bill^o is amendable by the instructions given to the officer; the declaration by the bill^p; the pleadings, subsequent to the declaration, by the paper-book^q, or draft under counsel's hand^r; the *nisi prius* roll by the plea roll^s; the verdict, whether

^k 1 Salk. 51. The rest, beginning with the 32 *Hen. VIII. c. 30.* are statutes of *Jeofails*.

^l *Id.* 2 *Ld. Raym.* 1307. *Gilb. C. P.* 116.

^m *Wiles*, 122.

ⁿ 8 *Co.* 161. 1 *Ld. Raym.* 564. 1 *Salk.* 49. *S. C. Barnes*, 10. 16. 22.

^o *Barnes*, 3. 11. 16. 24. 26.

^p 1 *Str.* 583. 2 *Str.* 954. 1151. 1162. 1271. *Say. Rep.* 294.

^q 8 *Co.* 161. *b. Palm.* 404, 5. *Latch*, 58. 86. *S. C. Cro. Car.* 144. 1 *Salk.* 50. 88. 2 *Ld. Raym.* 895. *S. C.*

^r *Cro. Eliz.* 258. 2 *Str.* 846. 1 *Barnard. K. B.* 213. 220. *S. C.*

^s 8 *Co.* 161. *b. Cro. Car.* 203. 1 *Salk.* 48. 1 *Ld. Raym.* 94. 12 *Mod.* 107. *Comb.* 393. *S. C.* 2 *Str.* 1264. *Say. Rep.* 76. *Barnes*, 14. but see 1 *Ld. Raym.* 511.

whether general or special, by the plea-roll^c, memory^u or notes^v of the judge, or notes of the associate or clerk of assize^w; and if special, by the notes of counsel^x, or even by an affidavit of what was proved upon the trial^y; the judgment by the verdict^z; and the writ of execution by the judgment^a, or by the award of it on the roll^b.

The amendment may be made in any stage of the proceedings; and those things which are amendable *before* error brought, are amendable *afterwards*, so long as diminution may be alleged, and a *certiorari* awarded^c. After error brought in this court, on a judgment of the Common Pleas, the amendment may be made here^d, or in the court below^e. If it be made in the

^c 1 Ld. Raym. 133.

47, 8. 53.

^u Cro. Car. 338. Gilb. C. P. 164. 1 Bac. Abr. 101. Bul. Ni. Pri. 320. Barnes, 6. 449.

^v 1 Str. 514. 8 Mod. 49. S. C.

^w 2 Str. 1197. 1 Wils. 33. S. C. Doug. 376. 673. 722. 745. 3 T. R. 659. 749. Barnes, 478. but see 6 T. R. 694.

^x 2 Str. 787. 3 T. R. 349.

^a Say. Rep. 12. 2 Blac. Rep. 836. 2 T. R. 737. 3 T. R. 657.

^w Cro. Car. 145. 1 Salk. 47, 8. 1 Ld. Raym. 138. S. C. 1 Salk. 53. 1 Ld. Raym. 335. 1 Barnard. K. B. 191. 1 Bac. Abr. 101. Gilb. C. P. 163. but see 2 T. R. 281.

^b 2 Bos. & Pul. 336.

^c 8 Co. 162. a. W. Jon. 9. 3 T. R. 349. 659. 749. 7 T. R. 474. 703. and see 1 Salk. 269. Cas. temp. Hardw. 119. for the time of awarding a *certiorari*.

^d Poph. 102. 8 Co. 162. a. 2 Rol. Rep. 471.

^e 1 Rol. Rep. 82. Rol. Abr. 207. pl. 15. 1 Salk.

^e Poph. 102. Hardw. 505

the court below, a *certiorari* may be had, on alleging diminution, to bring up the record in its amended state; or if the clerk of the treasury of the Common Pleas attend with the record here, this court on motion will order the transcript to be amended by it^f. And this way of amending the transcript here, by the record there, is the course of the court, to save a *certiorari*; for if the record be right below, upon diminution alleged, the party may have a *certiorari* of common right for bringing it up^g. After error brought in the Exchequer-Chamber, upon a judgment of this court, it is necessary to make the amendment here; as this differs from the case of a writ of error from the Common Pleas, because that court is supposed to send up the very record, but this court sends only a transcript^h. When the record in such case is amended, it is either certified into the Exchequer-Chamber, upon diminution allegedⁱ; or upon carrying it there, by the clerk of the treasury of this court, the justices and barons will order the transcript to be amended^j; or the transcript may be brought back, and amended in this court, by the original record^k. If there be any *mistake* in the transcript, by the negligence

^f 2 Rol. Rep. 471. Hardr.
505.

^g 1 Salk. 49.

^h 2 Str. 837

ⁱ Cro. Jac. 429. 628. 2 Rol.
Rep. 471.

^j 1 Rol. Abr. 209.

^k *Id.* 2 Str. 837.

gence of the clerk, the court above, on carrying up the record, will order the transcript to be amended by it ^l: and though, after a writ of error, it is not usual to suffer an amendment of the record of an inferior court ^m, yet where there is a mistake in the transcript, the court above will order it to be rectified ⁿ.

On an amendment after error brought, it was not formerly usual to allow the plaintiff his costs of the writ of error ^o; but it is now settled, that they shall be allowed him, provided the amendment be made after final judgment, and the plaintiff, after notice of the amendment, do not proceed farther ^p; but if the amendment be made before final judgment ^q, or the plaintiff proceed after notice thereof ^r, he shall not be allowed his costs. And where amendments are made, upon a writ of error, after verdict, &c. by virtue of the statutes of jeofails, no costs are given; for the construction of those statutes has been, to give judgment for the party upon the writ of error, as if the amendments had been made ^s.

^l Hardr. 505.

^m 1 Rol. Abr. 209, 10.

ⁿ 1 Wils. 337. Say. Rep.

59. S. C.

^o 3 Mod. 113.

^p 3 Lev. 361. 2 Ld. Raym

897.

^q 1 Ld. Raym. 95.

^r 1 Salk. 49. *in marg.*

^s Cas. *temp.* Hardw. 314

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